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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

C. Y. BENAVIDES, JR., WEBB COUNTY JUDGE, RICHARD MORALES, JR., COMMISSIONER, PRECINCT 3, WEBB COUNTY, HOMERO MATA, COMMISSIONER, PRECINCT 1, WEBB COUNTY, L. H. GUERRA, COMMISSIONER, PRECINCT 2, WEBB COUNTY, ARNULFO SANTOS, COMMISSIONER, PRECINCT 4, WEBB COUNTY; IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE WEBB COUNTY COMMISSIONERS COURT; THE COMMISSIONERS COURT OF WEBB COUNTY, TEXAS, WEBB COUNTY, TEXAS,
Petitioners

v.

EDGARDO A. GONZALEZ, JR.,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the governmental interest in securing relationships between high level executives and elected officials at whose grace they serve was properly considered?

Whether the record reveals evidence supportive of the actual governmental interest which was worthy of protection?

Whether proper consideration was given as to how petitioners reasonably perceived respondent's speech impacted upon the elected officials' relationship with the respondent who, as Executive Director of the agency, fell within that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech?

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Petitioners

v.

EDGARDO A. GONZALEZ, JR.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 24, 1985.

I.

OPINIONS OF THE COURTS BELOW

The first opinion of the United States Court of Appeals for the Fifth Circuit (Gonzalez I) is reported at 712 F.2d 142 (5th Cir. 1983). The second opinion of the United States Court of Appeals for the Fifth Circuit (Gonzalez II) is reported at No. 84-2440, 5th Cir. Slip Op. at 309, dated October 24, 1985. These opinions are hereto appended as Appendix A. The initial judgment and Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas, Laredo Division and its subsequent judgment and Supplemental Findings of Fact and Conclusions of Law which followed the remand are hereto appended as Appendix B.

II.

STATEMENT OF JURISDICTION

On October 24, 1985, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for the Southern District of Texas, Laredo Division, entered on July 10, 1984, awarding plaintiff damages pursuant to 42 U.S.C. Sec. 1983, following a remand of this case.

On November 21, 1985, the United States Court of Appeals for the Fifth Circuit entered an Order denying Petitioners' Motion For Rehearing.

This Court has jurisdiction of the Petition for Writ of Certiorari pursuant to 28 U.S.C. Sec. 1254 (1948).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

42 U.S.C. Sec. 1983 (1979):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IV.

STATEMENT OF THE CASE

The respondent was Executive Director of the Laredo Webb County Community Action Agency (C.A.A.). That agency administers a variety of federally funded anti-poverty programs in Webb County, Texas. The Webb County Commissioners Court designated itself as the Community Action Agency for Webb County in 1970. The elected Commissioners' Court has the ultimate responsibility for enforcing compliance with all grant conditions, approving all program plans, priorities, and budgets, and ratifying all actions of the Administering Board. The Commissioners Court was empowered to hire and fire all senior staff of the agency including the Executive Director and the Deputy Director. The Commissioners Court created an Administering Board of twenty-one (21) persons, including representatives of the poor, business, civic leaders, and elected officials, and approved a set of regulations to govern the operations of the agency. The Administering Board oversaw Agency planning and administration and was charged with the day to day supervision of the Executive Director.

The elected Commissioners were ultimately answerable to the voters of Webb County for the success or failure of the programs of the agency.

Respondent began working for the predecessor of the agency in 1969. He was hired by petitioners as Executive Director of the agency on March 20, 1979. As Executive Director, respondent had the day to day responsibility for implementing all policies of the agency. He had the responsibility of hiring, supervising, training and evaluating most, if not all, of the employees of the Community

Action Agency. Respondent had broad discretionary responsibilities as Executive Director, with broad and loosely defined objectives. He was the chief executive officer and, as such, was not merely an advisor. Instead, he formulated plans for the implementation of broad goals of the agency and had broad discretion over the allocation of its funds and personnel. This power afforded respondent the opportunity to thwart or forward the goals of the petitioners, who had selected respondent to serve as Executive Director at their pleasure and who were ultimately responsible to the voters.

In May of 1980, respondent discharged the Deputy Director of the agency who had been hired by petitioners. After investigating the matter, the petitioners decided that the Deputy Director had not been terminated because respondent had no right to fire him and publicly reprimanded respondent for attempting to terminate the Deputy Director.

It being apparent that personnel problems existed at the senior staff level of the Community Action Agency, the petitioners initiated an investigation into the job performances of the Executive Director and the Deputy Director. Respondent requested that he be allowed to make a public statement at the conclusion of the investigation. On June 23, 1980, at approximately 5:30 o'clock p.m., after having interviewed approximately twenty-six (26) witnesses incident to such investigation, petitioners invited respondent to make his requested public statement. Respondent stated publicly that the regulations of the agency allowed him to fire the Deputy Director and that petitioners did not have any authority to evaluate his job performance. He maintained that C.A.A. regulations pro-

vided that only the Administering Board could evaluate his job performance.

Petitioners informed respondent that it was their position that the Commissioners' Court of Webb County, Texas, as the governing body of the agency, had the absolute right to hire and fire the Executive Director, since they had selected him to serve as their Executive Director and he served at their pleasure. Petitioners maintained that they had the inherent right to evaluate the job performance of the Executive Director, and that C.A.A. policy allowing the Administering Board to evaluate the Executive Director did not conflict with their inherent right to evaluate the job performance of respondent. Respondent insisted, however, that the agency regulations deprived the Commissioners' Court of the authority to evaluate the Executive Director's job performance.

Suggesting a developing irreconcilable difference between petitioners and respondent over who was in authority of the agency, petitioners asked respondent to reconsider his position and to acknowledge the authority of petitioners to evaluate his job performance even though he did not agree with their position. The petitioners then recessed the hearing for approximately twenty (20) to thirty (30) minutes for the purpose of allowing respondent to confer with his attorney. Thereafter, respondent refused to acknowledge the authority of petitioners to evaluate his job performance and petitioners immediately voted unanimously to terminate the respondent.

This suit followed. The Trial Court, in its initial judgment, held respondent's job termination contravened the First Amendment and awarded respondent a money judgment. Upon appeal, the Court below remanded, instructing the Trial Court to determine if respondent's position

fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech. The Trial Court found that such a relationship between the elected officials and their Executive Director did in fact exist. However, it nevertheless again affirmed its orignal judgment. On appeal from this ruling, the Court below affirmed the Trial Court on October 24, 1985. A timely filed Motion for Rehearing was subsequently overruled.

V.

REASONS FOR GRANTING THE WRIT

A. This case merits review by this Court since it involves job termination of a high level executive, an expediter of policy, whose position allowed him to forward or thwart the goals of the elected officials at whose grace he served. The opinion in *Gonzalez II* greatly narrows the defined governmental interest found worthy of protection in the earlier remand opinion in the case, *Gonzalez I*. Such opinion is a departure from principles announced by this Court in *Connick v. Myers,* 461 U.S. 138 (1983).

B. This case merits review by this Court on Certiorari to settle the issue that courts must give due consideration to the employer's view of how the speech related conduct affected the employer-employee relationship as required under *Connick v. Myers,* 461 U.S. 138 (1983).

C. This case merits review by this Court on Certiorari to clarify the actual governmental interest worthy of protection and thereby resolve the conflict in the analysis of the undisputed record in this case in *Gonzalez I* and *Gonzalez II* and bring *Gonzalez II* in conformity with the reasoning in *Connick v. Myers,* 461 U.S. 138 (1983).

VI.

ARGUMENT

THE FIRST AMENDMENT DOES NOT PROTECT SPEECH RELATED ACTIVITY DISRUPTIVE OF THE FRAGILE RELATIONSHIP BETWEEN ELECTED OFFICIALS AND THEIR APPOINTED HIGH LEVEL EXECUTIVES

The Trial Court, following the remand of this case in *Gonzalez I*, specifically found that respondent's relationship to the petitioners, "fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." 712 F.2d at 150.

Petitioners submit that the error of law in the opinion in *Gonzalez II* stems from that Court's failure to recognize that the speech related conduct of the respondent was reasonably viewed by the petitioners as demonstrating an irreconcilable difference between the elected officials and their selected executive director as to who was in effective control and authority over the agency. In *Pickering v. Board of Education,* (391 U.S. 563), this Court recognized a legitimate governmental interest in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568. In *Connick,* this Court confirmed this governmental interest stating that government offices cannot function if every employment decision becomes a constitutional matter. *Connick v. Myers,* 461 U.S. at 143. In *Connick,* it is explained that in exercising the constitutional balance, the speech must be determined by the content, form and context of the speech as revealed by the whole record, 461 U.S. at 147-48, with a wide degree of deference to the employer's view of the

speech related conduct and its effect on the employer-employee relationship. 461 U.S. at 152. In *Gonzalez I*, the U.S. Court of Appeals for the Fifth Circuit carefully reviewed *Pickering* and its progeny, including *Connick*, and focused on the fact that the record here was one of first impression presenting that unique relationship which must exist between certain high level executives and the elected officials at whose grace they serve and required that conduct which was disruptive of such a relationship must be carefully weighed by the appellate courts independently of any findings or conclusions of law by the Court below.

This case presents for review a confrontation which, while involving an agency carrying out a local program, is no different from that characterized by Justice Higginbotham in *Gonzalez I* where it is explained that reasoning which would permit the President to terminate a Deputy Secretary of Defense because he was a member of the opposition party but would prohibit the President from firing such deputy for public speech of policy contrary to that of the President "suffers for lack of defining principle". 712 F.2d at 148.

THE BALANCING REQUIRED SHOULD NOT BE FORMULAIC

Whether or not a public employee's speech is protected under the First Amendment requires a balancing of the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The Courts

have held that the contours of an individual's First Amendment rights must depend upon the particular facts and special circumstances of the case. *See Pickering v. Board of Education,* 391 U.S. at 569; *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1014 (5th Cir. 1984). The determination of whether speech is constitutionally protected is a question of law requiring the independent constitutional judgment of the reviewing Court. *See e.g. Connick v. Myers,* 461 U.S. at 148 fn. 7 and at 150 fn. 10; *Brown v. Bullard Independent School District,* 640 F.2d 651, 653 (5th Cir. 1981); *Williams v. Board of Regents,* 629 F.2d 993, 1003 (5th Cir. 1980).

Upon the initial trial of this cause, the Trial Court mechanically and rigidly applied the guidelines set forth in *Pickering* and concluded that the balance should be struck in favor of the respondent. On appeal, the United States Court of Appeals for the Fifth Circuit, in *Gonzalez I,* remanded, instructing the Trial Court to identify and consider the defined governmental interest at stake and to weigh the interest in the speech itself against the impact of the speech upon the relationship of the parties and that relationship's role in the elected officials' discharge of their duties. *See Gonzalez v. Benavides,* 712 F.2d at 150.

In *Gonzalez I,* the Court below noted that no previous case had addressed the discharge of a person, such as respondent, who functioned as a chief executive officer and who was terminable at the will of his elected employer, 712 F.2d at 147, and concluded that a governmental employee whose position fell within this narrow band of fragile relationships implicated a different governmental interest from that previously considered under other *Pickering* cases. It correctly recognized that "[t]here is a governmental interest in securing those unique rela-

tionships between certain high level executives and the elected officials at whose grace they serve." *Id.* at 148. This governmental interest was found by the panel of Court of Appeals in *Gonzalez I* to be significant for the reason that elected officials must be given the power and flexibility to implement through high level executive employees those policies for which the elected officials must answer to the voters. *Id.* at 148.

Following the remand, the Trial Court found respondent did occupy such a sensitive policy-making position. It concluded, however, that the speech did not adversely impact upon respondent's relationship with petitioners.

Following the Trial Court's affirmance of its earlier judgment, an appeal was again made to the United States Court of Appeals for the Fifth Circuit. The panel of the Court below which considered this appeal incorrectly defined the governmental interest to be protected, held there was no evidence in the record to support the governmental interest, and affirmed the District Court's judgment. *Gonzalez v. Benavides,* No. 84-2440, 5th Cir., Slip Op. at 309, dated October 24, 1985 (*Gonzalez II*).

THE GOVERNMENTAL INTEREST INVOLVED AND THE EVIDENCE SUPPORTING SAME

The Trial Court found that respondent's speech outweighed any governmental interest revealed in the record. It reasoned that the working relationship between respondent and petitioners was not of such a personal and intimate nature as to cause respondent's statement to seriously undermine the effectiveness of the relationship. (District Court's Conclusion of Law No. 5, page 14). On appeal, in *Gonzalez I,* the Court below correctly recognized that protection of an intimate day-to-day working relationship

was not the governmental interest involved. 712 F.2d at 148. In reviewing the evidence, the Court, in *Gonzalez I*, found arguably present a governmental interest in protecting and securing that unique and fragile relationship between a high level executive and the elected officials at whose grace he serves. *Id.* at 148. The cause was remanded to the Trial Court with instructions to consider whether or not the relationship between respondent and petitioners "fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Id.* at 150.

Following the remand, the Trial Court concluded that because respondent's position was that of a high policy-making employee, the governmental interest described in *Gonzalez I* was indeed present. However, the Trial Court and the Court below, in *Gonzalez II*, avoided giving any weight in the *Pickering* balance to the governmental interest as defined in *Gonzalez I*, suggesting a lack of evidence to sustain any governmental interest to be protected.

This Court has previously held that in weighing competing interests such as are presented here, the Court must give full consideration to a governmental interest in the effective and efficient fulfillment of its responsibilities to the public. *Connick v. Myers*, 461 U.S. 138, 150 (1983). Following this reasoning, the Court of Appeals, in *Gonzalez I*, correctly recognized that "Government has an interest in conceding to elected officials the power to implement policy for which they must answer to the voters." 712 F.2d at 148. When, as in this case, the governing body implements policy and fulfills its responsibilities to the public through the performance of an appointed chief executive officer, the

governing body, the employer, has a strong interest in a secure and confident relationship with its chief executive officer, selected to serve at their pleasure as the administrative head of the agency. *See Id.* at 148. As Executive Director of the agency, respondent was the chief executive officer with broad discretionary responsibilities and loosely defined objectives. This power afforded respondent the ability to thwart the goals of the agency and frustrate the objectives of the elected Commissioners' Court. *See Id.* at 150; *See also* District Court's Supplemental Findings of Fact and Conclusions of Law, page 12. It is undisputed that petitioners, as the Webb County Commissioners' Court, were the governing body of the local C.A.A. and, as such, were answerable to the Webb County voters for the success or failure of the C.A.A. programs. The success of these programs depended in large measure upon the efforts and ability of the Executive Director. Having chosen the respondent to serve at their pleasure in such a sensitive position, they had a right to expect unfettered loyalty and adherence to their position.

Petitioners' confidence in respondent to implement their policies and his loyalty to them in carrying out his duties as chief executive officer are very substantial governmental interests to be protected in this case. As stated in *Gonzalez I*, "knowing that the buck stops, and where, is a substantial governmental interest." 712 F.2d at 148.

NO RECOGNITION WAS GIVEN TO PETITIONERS' VIEW OF THE IMPACT OF THE SPEECH

The Court below has failed to fairly consider how petitioners viewed the actual impact of respondent's speech

upon his relationship with petitioners and their control over the agency. By doing so, the Court below erred in failing to give due weight to the actual governmental interest worthy of protection as presented in the record of this case.

The District Court, during the trial of this cause, summarized the confrontation between the parties as follows: "But at some point, they say: Well, if you're going to take the position that you can fire Chavez, rather than us; and if you're going to take the position that we don't have the power to investigate you and evaluate you, then we can't live with you any more." (Transcript, page 122, line 22 to page 123, line 1); "In other words, if an employer says I have the power to do this and that and the employee says No you don't, then the employer says well, . . . I either do or I don't and if you say I don't, well, then, we can't live together." (Supplemental Transcript, page 96, lines 14-19).

Statements in the record made by Judge Benavides, Commissioner Morales and Commissioner Guerra, reasonably interpreted, all lend support to the Trial Court's summarization of the nature of this confrontation which went to the very heart of the employer-employee relationship. The job termination of this key employee, selected by petitioners to serve at their pleasure, was a direct result of his unwillingness to publicly accept his employers' position on matters involving their core authority over the agency. The record supports a reasonable belief on the part of the petitioners that respondent, in electing not to comply with his employers' request, was, in effect, denying petitioners' authority over him. That this was the petitioners' view of the matter is recognized in *Gonzalez I* by the statement that "it was stipulated at trial that Gon-

zalez was fired because he denied that the commissioners were his superiors." 712 F.2d at 145.

It is important to note that this confrontation between the parties as to petitioners' authority to evaluate respondent's job performance arose at the end of an investigation initiated by petitioners into respondent's job performance. Relying on what the Trial Court has described as "confusing and perhaps conflicting guidelines" of the C.A.A., respondent, partly through counsel, engaged in a debate with his employer resulting in his public disavowal of their authority to evaluate his job performance. Under these circumstances, respondent's speech, by its inherent nature, was such as to support petitioners' view that they were no longer comfortable with allowing respondent to serve as the Executive Director of the agency. By his speech, respondent placed in question his loyalty to petitioners. The Commissioners' Court's immediate and unanimous decision to terminate respondent was simply a decision to terminate the job of a key employee whose relationship with the governing body had been affected by his speech. As perceived by petitioners, the security and confidence of their relationship with their chief executive officer was undermined by respondent's refusal to recognize their authority over him. The Court of Appeals, in *Gonzalez I*, found such a conclusion to be apparent from the record. As stated by the Court in *Gonzalez I*, "[a]t the same time, denying the core authority of the commissioners . . . was hardly supportive of their relationship. To the contrary, it plainly kept taut the tension drawn from an unsettled question of where local power and authority lay in the administration of this program in Webb County. In this sense, the working relationship between Gonzalez and the commissioners was 'undermined'." 712 F.2d at 146.

The contrary result reached by the Trial Court and the Court of Appeals, in *Gonzalez II*, can only be explained by ignoring the government's view of the confrontation which resulted in respondent's discharge. However, this Court in *Connick* has instructed that the governmental interest should be looked at broadly with reasonable deference to the view of the matter taken by the employer. *Connick v. Myers*, 461 U.S. 138, 151 (1983). As further explained in *Connick*, petitioners' view that the employee's conduct undermined the effectiveness of the employment relationship should be given added weight when the dispute is of the kind present here. "When employee's speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Id.* at 153.

The Trial Court and the Court below in *Gonzalez II*, failed to consider that respondent's public position, no matter how well intended and diplomatically stated, was nonetheless viewed by the petitioners as a challenge to their core authority over the administrative head of an agency for which they were responsible to the voters.

The Trial Court's erroneous conclusion that respondent's speech did not undermine the effectiveness of his relationship with petitioners was based on its mechanical application of factors found to be relevant in *Connick*. For example, the Trial Court concludes respondent did nothing to create a "mini-insurrection" or an insubordinate act. (District Court's Supplemental Findings of Fact and Conclusions of Law, page 5). The District Court also considered as relevant the fact that respondent did

not circulate among other employees petitions supporting his view or opposing that of the petitioners. (District Court's Supplemental Findings of Fact and Conclusions of Law, page 6.) The *Pickering* analysis, however, is not susceptible to formulaic structure nor to mechanical application. See *Gonzalez v. Benavides,* 712 F.2d at 147.

The factors considered relevant by the Court below, in *Gonzalez II,* also missed the mark. For instance, the Court, in *Gonzalez II,* noted that respondent's refusal to acknowledge his superiors' authority posed no immediate threat to the operation of the agency. See *Gonzalez v. Benavides,* No. 84-2440, 5th Cir. Slip Op. at 319, dated October 24, 1985. However, this Court has made clear in several opinions that the government employer need not wait for a disgruntled employee to actually disrupt the operations of the office prior to discharge. The following proposition was established over a decade ago by this Court in *Arnett v. Kennedy,* 416 U.S. 134, 168 (1974):

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

See also Connick v. Myers, 461 U.S. 151 (1983).

Indeed, even the Court below, in *Gonzalez II,* acknowledged that the uncertainty of authority and responsibility as among the County Commissioners' Court, the Administering Board, the Executive Director, and the Deputy

Director, had already generated friction and reduced the efficiency of the agency. *Gonzalez v. Benavides*, No. 84-2440, 5th Cir. Slip Op. at 317, dated October 24, 1985. As stated in *Connick*, "[w]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick v. Myers*, 461 U.S. 138, 152 (1983).

The Court below, in *Gonzalez II*, noted that "Gonzalez did not refuse to carry out the County Commissioners' directives so long as they were consistent with C.A.A. regulations." *Gonzalez v. Benavides*, No. 84-2440, 5th Cir. Slip Op. at 319, dated October 24, 1985. This statement makes it clear that the Court only viewed one side of the coin, respondent's side, and wholly failed to view the confrontation from the petitioners' point of view. In determining the impact of that publicly stated position upon the relationship of the parties and petitioners' authority over the agency, the Court below should have viewed the speech related activity as it was reasonably perceived by the petitioners, considering the context in which the speech was made. *Connick v. Myers*, 461 U.S. 138 (1983). It cannot be denied that harm to the employment relationship resulted from the very nature of position taken publicly by the respondent. Nothing is more basic to an employment relationship than an employer's prerogative to examine his employee's performance on the job in considering whether to retain or discharge him. The chief executive officer of the agency stated that his employer had no authority to evaluate his job performance. The impact of this public position on the fragile relationship of the parties was initially understood by the District Court at the trial when it stated:

"I think it fits the First Amendment case, and yet it troubles me a little bit because it seems that it's the sort of disagreement that would go right to the heart of an employer-employee relationship. . . ." (Supplemental Transcript page 101, line 22 to page 102, line 4). After remand, however, the Trial Court failed to perceive this harm and, as a result, erroneously ruled in favor of respondent.

In order to properly balance the competing interests of the government employer and its employee as required by *Pickering* and its progeny, the Court below should have first accurately identified the governmental interest to be protected. It should have recognized petitioners' interest in a secure and confident relationship with its chief executive officer. It did not do so. Rather, it mistakingly perceived that the governmental interest to be protected was one which related to some suggested political program and then held that the record failed to reveal how petitioners "political program" was undermined by the speech. *Gonzalez I*, Slip Op. at 319.

Petitioners submit that the actual governmental interest worthy of protection was correctly defined in *Gonzalez I* when that panel reasoned that:

> One could argue that protection of direct expression regarding matters of public interest includes absolute job security even for holders of uniquely responsible positions. The argument would be that because such persons are likely to be the best informed on matters of public interest, the "purity" of their speech warrants sufficient weight to override any governmental interests in avoiding frustration of an elected official's implementation of policy. The problem with this reasoning is both intuitively and conceptually

> obvious. The constitutional overlay of executive power aside, reasoning that permits the President to terminate a Deputy Secretary of Defense because he is a member of the opposition party but prohibits him from firing the Deputy for a public expression of policy contrary to his own suffers for lack of defining principle.

712 F.2d at 147-148.

The panel in *Gonzalez I* went on to note that "the First Amendment surely does not require elected officials to sit silently by while their appointed chief executive publicly disavows the officials' authority over him. . . . Tolerance of such frosted relationships can deny the elected officials' authority to do their job." *Id.* at 148.

Where a public employee's speech creates an irreconcilable difference between himself and his superior which deals directly with core authority and the very nature of the employer-employee relationship, the resulting termination should not be considered a denial of the employee's constitutional right of free speech since the confrontation itself is a sufficient and justifiable basis for job termination. The governmental interest to be protected is all the more compelling where, as here, the public employer-employee relationship falls into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech. The Court below failed to consider the actual governmental interest which should have been weighed. Rather, it focused on some perceived "political program". In doing so, it ignored uncontroverted evidence demonstrating why petitioners reasonably believed an irreconcilable difference had arisen and elected to terminate respondent from his position as Executive Director of the Agency.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE A. MANN
Attorney of Record for Petitioners

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari, have been served on all parties required to be served, i.e., on Respondent by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record, Oscar Laurel, Jr., 777 Calle del Norte, Suite 5, Laredo, Texas 78041, this 21st day of January, 1986.

LAWRENCE A. MANN

APPENDIX

APPENDIX A

Edgardo A. GONZALEZ, Jr.,
Plaintiff-Appellee Cross-Appellant,

v.

C.Y. BENAVIDES, Jr., et al.,
Defendants-Appellants Cross-Appellees.

No. 81-2389.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1983.

Executive director of community action agency brought action against county commissioners, challenging his termination. The United States District Court for the Southern District of Texas, George P. Kazen, J., entered judgment for executive director, and commissioners appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that where executive director had broad, discretionary responsibilities with loosely defined objectives, and was entrusted to provide guidance and to choose a staff that would shape and give content to programs administered by the agency, executive director's suit challenging his termination on First Amendment grounds presented issue as to whether director's position fell into the narrow band of fragile relationships requiring job security loyalty at the expense of unfettered speech; because district court did not consider governmental interest in protecting such relationships when it evaluated the evidence, cause would be remanded for further consideration.

Remanded.

Oscar J. Pena, Lawrence A. Mann, Laredo, Tex., for defendants-appellants cross-appellees.

Luis Segura, San Antonio, Tex., Oscar M. Laurel, Jr., Laredo, Tex., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Southern District of Texas.

Before RANDALL and HIGGINBOTHAM, Circuit Judges, and BUCHMEYER,* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The executive director of a community action agency publicly denied that the county commissioners court had supervisory authority over his and his assistant's job performance. On his refusal to publicly retract the statement, the commissioners fired him. The commissioners appeal from a money judgment payable by the county entered after a bench trial upon a finding that the firing contravened the First Amendment. Finding that the trial court did not consider a governmental interest arguably present, we remand to allow the trial court to determine if such an interest was in fact presented and to weigh any found interest against the asserted speech laid in the context of the time, place, and manner of its making.

After eleven years as an employee of the Laredo-Webb County Community Action Agency, Edgardo A. Gonzalez, Jr. confronted the Commisisoners of Webb County on May 12, 1980, and was fired. He had then been Executive Director of the agency for approximately fourteen months.

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* District Judge of Northern District of Texas, sitting by designation.

Gonzalez sued the commissioners asserting claims under 42 U.S.C. § 1983. After a bench trial, the district court rejected Gonzalez's claim that he had a protected property interest in his job or that the circumstances surrounding his discharge were such as to trigger liberty interests. The trial court further found, however, that Gonzalez was fired for conduct protected by the First Amendment and, accordingly, awarded damages and attorneys' fees. The commissioners here argue that Gonzalez's "conduct" did not enjoy First Amendment protection, that any protected interest was outweighed by the statements, and that regardless, his speech was not a substantial factor in Gonzalez's termination.

Under the Community Action Agency concept, the Webb County Commissioners Court was the governing board of the agency and had the exclusive right to hire and fire its executive director. While the Commissioners Court maintained general governance by its control over the executive director, the immediate affairs of the agency were delegated to a twenty-one-person board functionally termed "the Administering Board." The terminal confrontation had its beginning on May 9, 1980, when Gonzalez decided to fire his Deputy Director, Oscar Chavez. Before doing so, Gonzalez spoke privately with at least two of the commissioners, one of whom told him he should proceed with what he thought was right, while the other cautioned that the Commissioners Court probably would not agree.

The latter advice proved to be accurate. When Gonzalez fired Chavez, the Commissioners Court immediately added that subject to its agenda for its scheduled meeting of May 12. Following an executive session of the Commissioners Court on May 12, the court issued a public

statement explaining the commissioners' view that Gonzalez lacked the authority to fire Chavez and reprimanded him for having attempted to do so. That statement also advised that Commissioner Morales was to investigate the incident. The public reprimand of Gonzalez was disseminated throughout the local media. The posted notice for the Commissioners Court meeting scheduled for June 16, 1980, included "discussion on Executive Director and Deputy Director's job performances C.A.A."

After some starting and stopping, the Commissioners Court finally convened on June 23 to consider the performance of Gonzalez and Chavez. Thereafter, in an executive session which for the most part proceeded without the attendance of Gonzalez or his attorney, the commissioners heard from twenty-six witnesses regarding the operation of the Community Action office. Despite its length, that session had no bearing on the decision to fire Gonzalez. It was at the conclusion of this executive session that Gonzalez and his attorney met with the Commissioners Court and the confrontation occurred. A transcript of the entire executive session's proceedings was received in evidence, but the colloquy among the commissioners, Gonzalez, and his attorney was often in the shorthand of conversation and occasionally less than articulate. Read in context and aided by the trial testimony, it is clear, as found by the trial court, that the dispute included a disagreement over whether it was the Administering Board or the Commissioner Court that had the legal right to evaluate the job performance of Gonzalez. Based on the transcript and the testimony at trial the trial court found:

> After further discussion, Commissioner Morales summarized by describing what he perceived to be "an

> irreconcilable difference" between Gonzalez and the Court. He repeated the position of the Commissioners Court that they had the absolute right to hire and fire the Executive Director. He specifically asked Gonzalez whether, regardless of his personal beliefs, he would publicly recognize that authority on the part of the Commissioners Court. At this point, the Commissioners took a recess of twenty to thirty minutes to enable Gonzalez to confer with his attorney and determine his response to the request. After the recess, Gonzalez' attorney then announced the decision that Gonzalez felt he was being asked to agree with something that he considered to be a violation of policies and procedures and that he refused to do so. The Commissioners then went into public session and voted to fire Gonzalez.

The trial court first found that no statement of Gonzalez constituted a personal attack on any member of the Commissioners Court and further found that "it cannot be said that Gonzalez's statements were false, much less malicious." It also found that the dispute was a matter of legitimate public concern because it involved a discussion of the power of the County Commissioners and the Administering Board over distribution by the Community Action Agency of millions of dollars in the community. In addition, the court concluded that the day-to-day working relationship between Gonzalez and the Commissioners Court was not of such a personal and intimate nature that Gonzalez's statements regarding the relative authority of the Board and the commissioners would undermine the effectiveness of their relationship. The court noted that there was no evidence that Gonzalez disobeyed or violated any order of the commissioners; instead, he "merely expressed the opinion that certain conduct by the commissioners was contrary to proper

procedures and was fired for failing to retract that statement." The court then explicitly found what it had already implicitly concluded, that Gonzalez's exercise of his First Amendment rights was a substantial and motivating factor in the decision by the commissioners to fire him. Indeed, it was stipulated at trial that Gonzalez was fired because he denied that the commissioners were his superiors.

But these findings of fact only set the factual stage for a difficult legal play. In concluding this prologue we note the standard of review recently noted in *Connick v. Myers*, ____U.S.____, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983):

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

Id. at ____ n. 10, 103 S. Ct. at 1692 n. 10 (*quoting Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L.Ed. 1295 (1946) (footnote omitted)). Reading this instruction with our usual standard for reviewing facts, we conclude that our independent constitutional judgment is to be made upon the facts sustained by our clearly erroneous rule. If, for example, the trial court resolves a genuine dispute as to whether statement A rather than B was made, our review of any First

Amendment question will accept the statement found by the trial court to have been made.

The commissioners rely heavily upon what has come to be termed a *Pickering* defense. That defense is derived from *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), as explicated by *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972), *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977), *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979), and *Connick v. Myers,* 461 U.S. ____, 103 S. Ct. 1684, 75 L.Ed.2d 708.

In *Pickering,* a school board terminated a teacher for sending a letter to a local newspaper criticizing the board's allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. The Illinois Supreme Court had rejected Pickering's First Amendment claims because it concluded that the school board's findings that the publication of the letter was "detrimental to the best interest of the school" were supported by substantial evidence. The Supreme Court found Pickering's termination violated his First Amendment rights. It emphasized that the relationship between the teacher and the school board was not so intimate as to be impaired by the letter. It also noted that an accusation in the letter regarding money spent on athletics only reflected "a difference of opinion between Pickering and the Board as to the preferable method of operating the school system, a difference of opinion that clearly concerns an issue of general public interest." 391 U.S. at 571, 88 S. Ct. at 1736. Finally, it also noted that the matter was one of "legitimate public

concern" about which "debate is vital to informed decision-making by the electorate." *Id.* at 571-72, 88 S. Ct. at 1736. The Court concluded that in the absence of proof of false statements knowingly or recklessly made, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his termination from public employment." *Id.* at 574, 88 S. Ct. at 1738.

In *Givhan*, the Court used the *Pickering* balance as the construct for review of private expressions of public employees and found that these expressions were entitled to protection similar to that of public expressions. Thus, the *Pickering* line socratically accommodated four concerns: first, whether the working relationship between the employer and the employee was of such a personal and intimate nature that any public criticism would seriously undermine the effectiveness of the working relationship; second, whether the statements were true, false or made with reckless disregard for the truth; third, whether the statements undermined the general effectiveness of the work group; and fourth, whether the statements were only critical of policy.[1]

The trial court weighed each of these concerns in its opinion. From the record it appears that Gonzalez's

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1. This court has consistently treated intimacy of working relationship as the fulcrum of the *Pickering* balance. At the same time we have described the result of this balancing exercise not in terms of "outweighed" statements but in terms of "unprotected" statements. *See, e.g., Bowen v. Watkins*, 669 F.2d 979, 986 n. 11 (5th Cir. 1982). The *Bowen* panel noted its agreement "with the *Hoopes* court's view [*Hoopes v. Nacrelli*, 512 F.Supp. 363 (E.D. Pa. 1981)] that statements injurious to close working relationships may be unprotected." *Id.* Whatever may be the importance in other contexts of describing speech as unprotected rather than outweighed, the *Bowen* panel was weighing and not categorizing, at least not in *Chaplinsky* terms. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942) ("fighting words" are unprotected).

statement regarding the operation of the Community Action Agency involved a matter of public concern. Moreover, the relationship between the Commissioners Court and Gonzalez was not of a personal and intimate nature in the sense that they worked closely together on a daily basis. It was, instead, more closely analogous of that of school principal versus board. So defined, denying the authority of the county commisisoners to superintend his work under the sanction of dismissal undermined no intimate relationship. There was no evidence that Gonzalez declined to follow any specific commissioners' directive or otherwise to discharge his duties. At the same time, denying the core authority of the commissioners to fire him was hardly supportive of their relationship. To the contrary, it plainly kept taut the tension drawn from an unsettled question of where local power and authority lay in the administration of this program in Webb County. In this sense, the working relationship between Gonzalez and the commissioners was "undermined." Under the *Pickering* balance, however, as the relationship expressed in terms of working environment between the employer and the targeted superior becomes increasingly remote and correspondingly less "intimate," the First Amendment rights shared in common with the citizenry return to the worker. If closeness of working environment and frequency of contact be the index, it would follow that because Gonzalez's denial touched upon a matter of public concern but did not undermine an intimate working relationship, the traditional *Pickering* balance would suggest that his firing contravened the First Amendment.

[1] Nevertheless, nothing in the *Pickering* line suggests the irrelevance of other governmental concerns in different fact situations. Indeed, the common conceptual

strand to much of our First Amendment jurisprudence is context—time, place, and manner. Implicit in this emphasis is that jealous protection of speech rights abjures mechanical response. The most recent *Pickering* offspring from the Supreme Court accents the Court's effort to avoid formulaic response. In *Connick v. Myers,* 461 U.S. ____, 103 S. Ct. 1684, 75 L.Ed.2d 708, the Court held by a five-to-four vote that the First Amendment did not prevent the New Orleans District Attorney from terminating an Assistant District Attorney who had circulated a questionnaire among the office staff. The questionnaire asked whether the employees felt transfers were fair, whether they had confidence in certain other employees, and whether they felt "pressured to work in political campaigns on behalf of office supported candidates." Charactizing most of Myers' questionnaire as involving matters only of "personal interest" rather than matters of "public concern," the Court held that "it is unnecessary for us to scrutinize the reasons for discharge." *Id.* at____, 103 S. Ct. at 1689. Although the Court did find that the question regarding coerced participation in political campaigns touched upon a matter of public concern, it held that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at ____, 103 S. Ct. at 1694. *Connick's* relevant contribution to *Pickering* is essentially incremental. First Amendment issues presented by speaking employees are not answerable by mechanical formulae; courts must engage in a weighing exercise, giving "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at____, 103 S. Ct. at 1692.

While the district court's balancing exercise was carefully undertaken, it was not in our view fully responsive to the governmental interests. None of the *Pickering* cases address the discharge of a person who functioned as the chief executive officer and expediter of policy and who was terminable at the will of his elected employer. Expressed another way we do not read the *Pickering* requirement of an intimate relationship to describe the exclusive category of possible government interests inhering in employer-employee relationships that can be weighed. While driven by concededly distinct concerns, the Court's struggle with political affiliation is here instructive because that effort identifies other governmental interests properly weighable that spring from relationships wholly without intimacy defined in terms of closeness of working environment.

In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980), the Court found that the First Amendment protected employees from discharge because of their political affiliation but excluded from this protection holders of certain "policy-level" positions. While the *Branti* Court eschewed this categorical inquiry, it continued to acknowledge that political affiliation may be a sufficient proxy of necessary loyalty as to be permissibly considered for certain types of "positions." Allowing political affiliation as a qualification for holding such sensitive positions represented a practical concession to the role of political parties with their disciplinary power of patronage in our government as well as to the necessity of leaving elected officials sufficient tools to carry out the policies of the offices to which they were elected.

[2] One could argue that protection of direct expression regarding matters of public interest includes absolute job security even for holders of uniquely responsible positions. The argument would be that because such persons are likely to be the best informed on matters of public interest, the "purity" of their speech warrants sufficient weight to override any governmental interests in avoiding frustration of an elected official's implementation of policy. The problem with this reasoning is both intuitively and conceptually obvious. The constitutional overlay of executive power aside, reasoning that permits the President to terminate a Deputy Secretary of Defense because he is a member of the opposition party but prohibits him from firing the Deputy for a public expression of policy contrary to his own suffers for lack of defining principle. Of course, the speech of such persons might not disrupt any intimate daily working relationship, but that is not the governmental interest being weighed. Government has an interest in conceding to elected officials the power to implement policy for which they must answer to the voters. In more familiar language, knowing that the buck stops, and where, is a substantial governmental interest. To put the issue argumentatively, the First Amendment surely does not require elected officials to sit silently by while their appointed chief executive publicly disavows the officials' authority over him. It is no answer to suggest that the elected officials also can turn to the idea marketplace to allow their view to compete with the policymaker they appointed. That answer skews the responsibility of the elected officials to the voters. Tolerance of such frosted relationships can deny the elected officials' authority to do their job.

[3] In summary, blind insistence upon the presence of an intimate working relationship gives to *Pickering* pre-

cisely that rigidity and formulaic structure that the Court so recently denied in *Connick*. It mistakenly interpolates from the description of the weighing of the interests in the factual contexts of *Pickering* and progeny a rule excluding other governmental interests. Protection of an intimate working relationship expressed in terms of closeness of daily work environment is not the putative governmental interest here. There was no such relationship and so the traditional *Pickering* case ends. There is a governmental interest in securing those unique relationships between certain high level executives and the elected officials at whose grace they serve. For this narrow band of relationships, refusing to grant First Amendment found tenure would seem to take away little freedom not already lost in accepting the appointment itself, at least when the appointive job has the sweep of authority and discretion as to be central to the elected official's duty. The holder of such a position can hardly have any reasonable expectation but that his policy choices must publicly fall within the protective license issued by his appointing officer. His selection presumably included that supposition. To say that loss of that job is the price for his public declaration chills little. For us it follows that disruption of the relationship between an appointing authority and a holder of such a senior position may be weighed in the assaying of his First Amendment right to escape termination for a public disavowal of his appointing authority's power of supervision. But we say no more than that such governmental interests are relevant to the First Amendment inquiry into the context of time, place, and manner.

In terms of this case the ultimate question is whether that interest was present here and was such that Gonzalez's First Amendment protection did not include job

security as executive director of the Community Action Agency. We turn then to the nature of Gonzalez's position as executive director, its relationship to the elected county commissioners, and the nature of the speech assertedly penalized to see if such an interest is arguably implicated here. In attempting to identify the kind of relationship we here protect we find the *Elrod-Branti* analysis helpful.

In *Elrod*, the Court described the characteristics of a policymaking employee:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of a broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

427 U.S. at 367-68, 96 S. Ct. at 2687. Later decisions add dimension. In *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977), *cert. denied*, 434 U.S. 968, 98 S. Ct. 513, 54 L.Ed.2d 455 (1977), the Seventh Circuit held that Milwaukee's deputy city attorney was a policymaker because he "functions in a highly discretionary role. He cannot perform his job by the simple exercise of ministerial competence. Rather, many of the decisions that he

makes will involve implementation of the policies of the city attorney's office as a whole. Some of these decisions will actually create policy." *Id.* at 830. *See also Mummau v. Ranck,* 687 F.2d 9, 10 (3d Cir. 1982) (holding that assistant district attorney fell within *Elrod-Branti* exception). More recently, this court held in *Stegmaier v. Trammell,* 597 F.2d 1027 (5th Cir. 1979), that a deputy circuit clerk of an Alabama state court was not employed in a policymaking position. We noted there that circuit clerks had no statutory authority to make policy decisions regarding compilation of data, prescription of business methods, preparation of budget recommendations, investigation of physical facilities, and distribution of supplies; this authority was vested in the administrative director of the courts. In contrast to the broad duties of the administrative director, the duties of the circuit clerk were specifically defined by statute and were limited to relatively ministerial tasks. *Id.* at 1034-38.

From our reading of the record the following facts might have been found. The Laredo-Webb County Community Action Agency was funded with approximately $2.5 million to be distributed to people in the county who were poor, unemployed, ill, handicapped, or otherwise disadvantaged. The elected Commissioners Court had the ultimate responsibility for enforcing compliance with all grant conditions, approving all program plans, priorities, and budgets, and ratifying all actions of the Administering Board. This Administering Board was composed in part of elected officials (two of whom were commissioners), representatives of the poor, and business and civic leaders. Under the governance of the commissioners these twenty-one members were the immediate "board" of the CAA and were the first line of review for staff decisions

regarding the solicitation and distribution of funds among some thirty programs. These programs ranged from "family planning" to "elderly feeding" to "storm disaster."

It appears that Gonzalez was the chief executive officer in this organizational scheme. According to a handbook of the Webb County Commissioners Court, the Executive Director had the day-to-day responsibility of implementing the policies and decisions subject to the Administering Board and, presumably, ultimately to the commissioners. He was required to keep the Administering Board informed about problems, progress, and status of the CAA's activities and to offer opinions and recommendations to guide the Board. In addition, he had the responsibility of hiring, supervising, training, and evaluating most CAA employees. He was the central figure in allocating money and personnel. If this be true there is little question but that he could make or break the program. Unlike the circuit clerk in *Stegmaier, supra*, Gonzalez as Executive Director had broad, discretionary responsibilities with loosely defined objectives. While the first line of responsibility for policy resided with the Administering Board and ultimately rested with the Commissioners Court, the Executive Director was entrusted to provide guidance and to choose a staff that would shape and give content to the programs. This power arguably afforded him the opportunity to thwart or to forward the goals of the elected commissioners. These elected commissioners were answerable to the voters of Webb County for CAA programs.

We conclude then that this record presents a possibility that the relationship between the commissioners and Gonzalez fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of un-

fettered speech. We find only that the record presents that issue. We do not suggest that our description is necessarily the one that will be found, only that when the inquiry is made there is evidence to support such a description. The trial judge has not evaluated the evidence with this governmental interest in protecting such relationships and we decline to do so for the first time on appeal. Instead we are persuaded that we must remand to allow the district court to make these decisions in the first instance.

On remand the trial court is free to take additional evidence. It should first decide from the facts whether in Gonzalez's relationship with the county commissioners his true position and power were such as to implicate the governmental interest we describe. If such an interest is implicated the trial court should then weigh that interest against the asserted rights of free speech. That weighing is required because we do not decide that all speech by persons in such relationships is unprotected. Rather, the speech must be weighed against its impact upon the relationship and that relationship's role in the elected official's discharge of his duties.

In this weighing one must look at what was said. We are wary of reviewing content in an *a priori* inquiry into entitlement to protection but that does not mean that content is irrelevant to the balancing exercise. In *Connick* the Court analyzed the nature of the asserted speech in determining its relevance to public issues. We require that here. The able trial judge has approached this case in a sensitive and thoughtful manner. We are reluctant to ask him to continue that effort, but we must do so.

REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2440

OPINION

EDGARDO A. GONZALEZ, JR.,
Plaintiff-Appellee,

v.

C. Y. BENAVIDES, JR.,
WEBB COUNTY JUDGE, ET AL.,
Defendants-Appellants.

Filed October 24, 1985

Before: Wisdom, Politz, and Tate, Circuit Judges.

Opinion by Judge Wisdom

Appeal from the United States District Court
for the Southern District of Texas

George P. Kazen, District Judge, Presiding

SUMMARY

Constitutional Law

Appeal from judgment for Gonzalez. Affirmed.

Gonzalez was Executive Director of the Laredo-Webb County Community Action Agency (CAA) which administers a variety of federally funded anti-poverty pro-

grams. An Administering Board, created by the Webb County Commissioners' Court, was charged with the day-to-day supervision of Gonzalez and was directed to evaluate his performance. Gonzalez discharged the Deputy Director of CAA and the Commissioners' Court reprimanded him. The Court then began an investigation of Gonzalez's job performance. Gonzalez appeared before the Court and publicly stated that the investigation violated CAA regulations. The Court demanded that Gonzalez publicly acknowledge their authority to evaluate his performance. He refused and was fired. Gonzalez brought suit under 42 U.S.C. § 1983 contending that his termination was an unconstitutional retaliation for protected speech and a violation of protected liberty and property interests.

[1] Under *Pickering v. Board of Education,* 1968, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811, the court is to strike "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." [2] In *Connick v. Myers,* 1983, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708, this analysis was further refined. [3] Both *Connick* and *Pickering* emphasize that the Supreme Court's enumeration of factors to weigh in the balance is not exhaustive. [4] Causation is established by the defendants' concession that Gonzalez was fired because of his speech. [5] Gonzalez raised a mixed issue of public and private concern. [6] The finding that because Gonzalez was in a position to frustrate policies on which the commissioners may have based their election campaigns his relationship was one which might require curtailment

of his speech even though he does not have a close working relationship with elected officials will not be disturbed. [7] The government's interest in the loyalty of a key executive employee must be weighed against the employee's speech rights. [8] Defendants offered no evidence to show Gonzalez's speech was likely to undermine the commissioners' political program. [9] There was nothing about the manner, time or place of Gonzalez's statements that would justify his dismissal. Therefore, the judgment for Gonzalez is affirmed.

OPINION

WISDOM, Circuit Judge:

In this case, before us for the second time,[1] we must balance a public employee's right to free speech against a public employer's interest in the effective and efficient performance of the agency the employee serves. In affirming the district court, we strike the constitutional balance in favor of the employee.

I.

Plaintiff Edgardo Gonzalez was Executive Director of the Laredo-Webb County Community Action Agency (CAA). The CAA administers a variety of federally funded anti-poverty programs in Webb County, Texas. Congress created community action agencies to involve local residents, including representatives of the poor and business and civic leaders, in developing and carrying out policies to reduce poverty. *See* H. Rep. No. 1458, 88th

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1. *See Gonzalez v. Benavides*, 5 Cir. 1983, 712 F.2d 142 (*Gonzalez I*).

Cong., 2nd Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2900, 2945. In 1967, Congress amended the Economic Opportunity Act to create a larger role for local elected officials. *See* H. Rep. No. 866, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Ad. News 2428, 2448-49. The 1967 amendments permit states or political subdivisions of states to designate themselves as community action agencies. 42 U.S.C. § 2790(a). If the state or political subdivision does so, it must create an "Administering Board" composed of equal numbers of representatives of the poor, representatives from "major groups and interests in the community", and elected officials. 42 U.S.C. § 2791(b). The Webb County Commissioners Court designated itself as the community action agency for Webb County. The commissioners created an Administering Board of 21 persons and approved a set of regulations to govern the operations of the CAA. The Commissioner's Court appointed the senior staff of the CAA, including the Executive Director and the Deputy Director. The commissioners also reviewed policies, plans, and regulations developed by the staff and the Administering Board, and ratified the minutes of Administering Board meetings. The Administering Board oversaw CAA planning and administration. We accept the district court's finding that the Administering Board "was clearly charged with the day-to-day supervision of Gonzalez and explicitly directed to evaluate his job performance."

Gonzalez began working for the predecessor of the CAA, the Webb County Economic Opportunities Development Corporation, in 1969. He became Executive Director of the CAA in March 1979. In May of 1980, Gonzalez discharged the Deputy Director of the CAA, Oscar Cha-

vez. The County Commissioners' Court reinstated Chavez, publicly reprimanded Gonzalez for exceeding his authority, and began an investigation of Gonzalez's job performance.

Gonzalez appeared before the Commissioners' Court and stated publicly that the investigation violated CAA regulations. During a lengthy closed session following his public statement, Gonzalez maintained that he was specifically authorized to dismiss any employee under a regulation approved by the commissioners.[2] Gonzalez apparently did not contest the commissioners' power to reinstate the Deputy Director. Instead, he objected that Chavez had not appealed first to the Administering Board, as required by the regulations.[3] Gonzalez conceded that the Commissioners' Court had the power to fire him with or without cause.[4] He insisted, however, that the regulations deprived the Commissioners' Court of authority to evaluate the Executive Director's job performance.[5] The commissioners argued that their power to fire Gonzalez necessarily included the power to evaluate him. They demanded that

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2. Gonzalez relied on a CAA regulation providing in part: "Any employee may be dismissed by the Executive Director . . . for cause". *Policies and Procedures, Laredo-Webb County Community Action Agency*, ch. XVI § 7.

3. Gonzalez maintained that Chavez was obliged to follow the CAA's personnel grievance procedure. That procedure calls for an appeal in writing to the Administering Board. *Id.* ch. XVII § 3(3).

4. Our impression in the earlier case that Gonzalez "den[ied] the core authority of the commissioners to fire him", *Gonzalez I*, 712 F.2d at 146, was mistaken. The district court so found. Indeed, another CAA regulation states that the Executive Director serves at the pleasure of the Commissioners' Court. *See Policies and Procedures, Laredo-Webb County Community Action Agency*, ch. XIX § 1.

5. Gonzalez cited a regulation providing that "[t]he performance evaluation of the Executive Director shall be made by the Administering Board." *Id.* ch. XII § 1. He maintained that the wording of the regulation precludes evaluation by any other body.

Gonzalez publicly acknowledge their authority to evaluate his performance.[6] Gonzalez refused, and the commissioners fired him.

Gonzalez brought suit under 42 U.S.C. § 1983, contending that his termination was an unconstitutional retaliation for protected speech and a violation of protected liberty and property interests. The district court rejected the due process claims, but concluded that Gonzalez's statements were protected by the First Amendment and awarded damages.[7] Employees may recover for actions taken by government employers in retaliation for protected speech even if the employee has no protected liberty or property interest in his job. *Mount Healthy City Board of Education v. Doyle*, 1977, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L.Ed.2d 471.

On appeal, we observed that Gonzalez apparently had wide discretion to carry out or subvert the policies of elected officials, and remanded so that the district court could determine whether the Executive Director's rela-

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6. The defendants suggest that the commissioners merely asked Gonzalez to recognize that their view differed from his. The district court, however, found that the commissioners required Gonzalez to accept their view. Our reading of the record supports the district court's finding. Gonzalez was unlikely to have risked his job simply to deny that the commissioners actually held the view they purported to hold.

7. Employees wrongfully dismissed for exercising their First Amendment rights generally are entitled to backpay and reinstatement, *see Kingsville Indep. School Dist. v. Cooper*, 5 Cir. 1980, 611 F.2d 1109, 1114, as well as attorney's fees, *see Stolberg v. Members of Bd. of Trustees*, 2 Cir. 1973, 474 F.2d 485, 490, and punitive damages for dismissals in bad faith, *see Donahue v. Staunton*, 7 Cir. 1972, 471 F.2d 475, 482, *cert. denied*, 410 U.S. 955 (1973). Gonzalez, however, has found another job at a slightly lower salary, while the County Court has hired a new Executive Director. The parties therefore agree that Gonzalez should recover only lost income and attorney's fees.

tionship with the Commissioners' Court fell "into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech". *Gonzalez I*, 712 F.2d at 150. We remanded the case to the district court to determine whether such a fragile relationship existed and, if so, whether Gonzalez's speech undermined the relationship.[8]

In an unpublished opinion, the district court found that Gonzalez occupied a sensitive policymaking position, but concluded that his speech was protected because it caused no significant harm to his relationship with the commissioners.

II.

[1] The Supreme Court has rejected the sweeping proposition that public employees may be required to surrender First Amendment rights as a condition of em-

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8. We said:

"On remand the trial court is free to take additional evidence. It should first decide from the facts whether in Gonzalez's relationship with the county commissioners his true position and power were such as to implicate the governmental interest we describe. If such an interest is implicated the trial court should then weigh that interest against the asserted rights of free speech. That weighing is required because we do not decide that all speech by persons in such relationships is unprotected. Rather, the speech must be weighed against its impact upon the relationship and that relationship's role in the elected official's discharge of his duties.

In this weighing one must look at what was said. We are wary of reviewing content in an *a priori* inquiry into entitlement to protection but that does not mean that content is irrelevant to the balancing exercise. In *Connick* the Court analyzed the nature of the asserted speech in determining its relevance to public issues. We require that here. The able trial judge has approached this case in a sensitive and thoughtful manner. We are reluctant to ask him to continue that effort, but we must do so." *Id.*

ployment. *See Keyeshian v. Board of Regents*, 1967, 385 U.S. 589, 605-06. 87 S. Ct. 675, 17 L.Ed.2d 629. Shortly after it handed down the *Keyeshian* opinion, the Court concluded that government employees are not always free to speak as private citizens. *Pickering v. Board of Education*, 1968, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811. The balancing test announced in *Pickering*, although simply stated, is often difficult and uncertain of application. *Pickering* instructs us to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its exployees." 391 U.S. at 817. The *Pickering* Court suggested some factors to be weighed in the balance: whether the statements were directed against persons with whom the speaker "would normally be in contact in the course of his daily work"; whether they had an adverse effect on "discipline by immediate superiors or harmony among coworkers"; whether "it can persuasively be claimed that personal loyalty and confidence are necessary" to a successful employment relationship; whether the employee's statements "either impeded [the] proper performance of his daily duties . . . or . . . interfered with the regular operation of the [agency]"; and whether the statements addressed a matter of public concern. *Id.* at 568-73.

[2] The Court refined the *Pickering* analysis in *Connick v. Myers*, 1983, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed. 2d 708. Under *Connick*, the employee's speech is entitled to judicial protection only if it addresses a matter of public concern. The Court reasoned that "speech concerning public affairs" is entitled to greater judicial protection because it "is more than self-expression; it is the

essence of self-government". *Connick,* 461 U.S. at 145, *quoting Garrison v. Louisiana,* 1964, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L.Ed.2d 125. Public employees, by virtue of their public employment, may make valuable contributions to the public debate. *See Pickering,* 391 U.S. at 572. The majority in *Connick* held that, if the employee commented on matters of only personal interest, the employee's discharge is not subject to First Amendment review "absent the most unusual circumstances". 461 U.S. at 147. Employee speech, even on issues of public concern, must be balanced against the government's interest in "prompt[ing] efficiency and integrity in the discharge of official duties" and in "maintain[ing] proper discipline in the public service". *Connick,* 461 U.S. at 150-51, *quoting Ex Parte* Curtis, (1882), 106 U.S. 371, 373, 27 L.Ed. 232. 1 S. Ct. 381. The *Connick* Court considered whether the employee's speech impeded her ability to carry out her job; whether close working relationships with superiors were disrupted; and the time, place, and manner of the speech. 461 U.S. at 151-53.

[3] Both *Connick* and *Pickering* emphasize that the Supreme Court's enumeration of factors to weigh in the balance is not exhaustive. *See* 461 U.S. at 153; 391 U.S. at 569. When we first considered this case, we identified an additional factor that may limit the employee's right to speak freely. We noted that senior government employees who exercise broad discretionary authority may be able to "make or break" the programs and policies of elected officials. *Gonzalez I,* 712 F.2d at 149. We analogized the interest at stake to the government's interest in the party affiliation of some employees. *Id.* at 147-49. *Cf. Branti v. Finkel,* 1980, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574; *Elrod v. Burns,* 1976, 427 U.S.

347, 96 S. Ct. 2673, 49 L.Ed.2d 547.[9] We concluded that the speech rights of such employees might have to be curtailed to safeguard the political process.

III.

We now apply the *Pickering-Connick* scheme to the Gonzalez case. Although this Court will not disturb the district court's findings of fact unless they are clearly erroneous, we must weigh the facts for ourselves to arrive at an "independent constitutional judgment". *See Connick,* 461 U.S. at 150 n. 10, *quoting Jacobellis v. Ohio,* 1964, 378 U.S. 184, 190, 66 S. Ct. 1676, 12 L.Ed. 2d 793 (opinion of Brennan, J.).

[4] The defendants concede that Gonzalez was fired because of his speech. The plaintiff therefore satisfies the causation requirement established in *Mount Healthy City Board of Education v. Doyle,* 1977, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471.

A.

[5] Whether Gonzalez commented upon matters of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record". *Connick,* 461 U.S. at 147-48.[10] We are mind-

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9. Our analogy does not conflate the categorical approach of the political affiliation cases with the individualized balancing required in employee speech cases. We simply identified an additional government interest to be weighed in the balance. This court has since viewed employee speech and employee party affiliation as endpoints on a single continuum. *See McBee v. Jim Hogg County,* 5 Cir. 1984, 730 F.2d 1009 (*en banc*). *McBee* is unnecessary to our analysis here.

10. The dissenters in *Connick* object that the majority's formulation weighs "context" twice, first to determine whether the speech addressed an issue of public concern, and then to balance the interests

ful of *Connick's* admonition that not every conflict between public servants should be elevated to an issue of public concern. *Id.* at 149. Gonzalez's disagreement with the commissioners indisputably was a matter of concern to Gonzalez as an employee. We do not read *Connick,* however, to exclude the possibility that an issue of private concern to the employee may also be an issue of public concern. Indeed, the teacher dress code at issue in *Mount Healthy,* and the school bonds under discussion in *Pickering,* appear to have been "mixed" issues of both public and private concern. *See* "The Supreme Court, 1982 Term," 97 *Harv. L. Rev.* 70, 171 (1984). We are persuaded that Gonzalez raised such a mixed issue.

First, Gonzalez raised the possibility that violations of CAA regulations would result in a loss of federal funds for poverty programs in Webb County.[11] Federal policy favors ensuring that representatives of the poor participate in policymaking. *See* 42 U.S.C. § 2791(b). The direct

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of speaker and government. 461 U.S. at 159-61. We do not see the force of this objection. Case-by-case adjudication requires consideration of "the whole record", including the "context" of the speech, to determine whether the speaker addressed an issue of actual, as opposed to merely potential, public concern.

11. In 1969, the Office of Economic Opportunity (superseded by the Community Services Administration in 1974) issued a memorandum stating that any community action agency failing to comply with the requirements of the statutes risked loss of federal funding. The memorandum stated that persistent failure to consult the Administering Board might result in loss of funding. Community Action Memorandum No. 81 at 8. A 1979 "instruction" from the Community Services Agency requires that the Administering Board must participate in the selection of the Executive Director. CSA Instruction 6400-01a. Gonzalez neglected to tell the Commissioners' Court about the more recent regulation before his final interview with them. We do not think Gonzalez's failure, however culpable, decreases the public importance of the issue he raised. Moreover, the earlier memorandum raised the possibility that failure to consult the Administering Board would result in a loss of funds.

intervention of the county commissioners contravened this policy. Although the Administrative Board ratified the action of the Commissioner's Court by a vote of eight to seven, the result might have been different if the Board had been consulted before the commissioners acted. Had federal funding been cut off, thousands of needy Webb County residents would have lost over a million dollars a year in federal assistance. While such a catastrophe may have been unlikely, we believe the importance of the programs at stake raised the issue to a matter of significant public concern.

Second, whether the Commissioners' Court complied with CAA regulations is a question of public concern. The regulations relied on by Gonzalez were ratified by the County Court itself. While Gonzalez's reading of the regulations is not indisputably correct, he raised legitimate questions of interpretation. We consider that compliance with the regulations by the Commissioners' Court is a matter of significant public concern.

Third, the uncertain allocation of authority and responsibility among the County Court, the CAA's Administering Board, the Executive Director, and the Deputy Director was a matter of public concern. That uncertainty resulted in this expensive and time-consuming lawsuit. Even before Gonzalez fired his deputy, this uncertainty generated friction and reduced the efficiency of the agency.

B.

Because we agree with the district court's conclusion that Gonzalez's speech raised issues of significant public concern, we next consider the government interest at stake.

In *Connick*, the Court found that a close working relationship with superiors was essential to the employee's job. 461 U.S. at 152. This case is different. The district court found that Gonzalez's job did not require frequent meetings with the Commissioner's Court. The Administering Board monitored the performance of Gonzalez and his staff; the Commissioner's Court generally limited its involvement to ratifying the minutes of Administering Board meetings.

[6] We noted, however, that a senior executive employee might be required to curtail his speech even though that employee does not have a close working relationship with elected officials. *Gonzalez I*, 712 F.2d at 148. We asked the trial judge to consider whether Gonzalez's relationship to the Commissioners' Court was particularly fragile because Gonzalez was in a position to frustrate policies on which the commissioners may have based their election campaigns. *Id.* at 149-50. The district court found that Gonzalez occupied a "policymaking" position giving rise to such a fragile relationship.

In considering party affiliation as a qualification for public employment, the Supreme Court has concluded that the "policymaking" label is not always decisive. *Branti v. Finkel*, 1980, 445 U.S. 507, 518, 100 S. Ct. 1287, 63 L.Ed.2d 574. In this instance, we think that the policymaking nature of Gonzalez's position is highly relevant to the question whether he could defeat the political program of elected officials. Gonzalez exercised broad discretion over the whole range of CAA programs. Although the evidence suggests that CAA policies often were developed by the Administering Board rather than the Commissioners' Court, CAA programs were a crucial

political concern of the county commissioners.[12] We will not disturb the district court's finding on this issue.

C.

[7] Finally, we must weigh the government's interest in the loyalty of a key executive employee against the employee's speech rights. "That weighing is required because we do not decide that all speech by persons in such relationships is unprotected. Rather, the speech must be weighed against its impact upon the relationship and that relationship's role in the elected official's discharge of his duties." *Gonzalez I*, 712 F.2d at 150.

"[T]he [government's] burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. In *Connick*, the Court held that the public employer was justified in dismissing the employee because the employer reasonably believed the employee's speech was likely to disrupt its operations. 461 U.S. at 152. The majority carefully noted, however, that a stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern. *Id.* We have concluded that Gonzalez directly addressed matters of substantial public concern. We conclude, moreover, that the defendants have not made even the lesser showing required in *Connick*.

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12. Our analysis suggests that the Executive Director might have been dismissed because of his party affiliation under *Elrod* and *Branti*. We need not, and do not, express an opinion on the question. We note, however, that Congress has expressed a preference for insulating community action agencies from some local political pressures, and that the Community Services Administration now requires Administering Board participation in the selection, if not the dismissal, of the Executive Director.

[8] The defendants offered no evidence to show that Gonzalez's speech was likely to undermine the commissioners' political program. Gonzalez's refusal to acquiesce posed no immediate threat to the operation of the CAA. Gonzalez did not refuse to carry out the county Commissioners' directives so long as they were consistent with CAA regulations. The district court found that there was "absolutely no evidence or contention that Gonzalez refused to abide by" the commissioners' decision. He offered to help amend the regulations to suit the Commissioners. There is no suggestion that the commissioners' policies were in such imminent danger that there was no time to amend the procedures to settle the dispute.

Gonzalez did not challenge the commissioners' power to fire him. He did not deny that the Commissioners had authority to reinstate Deputy Director Chavez; Gonzalez merely insisted that he had the authority to fire Chavez in the first place, and that Chavez should have followed regulations by appealing to the Administering Board. Gonzalez did not attempt to obstruct the commissioners' investigation; he merely protested that the commissioners were violating agency regulations.

The defendants argue that Gonzalez's refusal to acquiesce was a challenge to their authority. That argument begs the question. If the commissioners acted contrary to CAA procedures, as Gonzalez maintains, they exceeded the authority allocated to them by regulations the Commissioner's Court itself had approved. Gonzalez merely stated that, in his opinion, the commissioners were acting *ultra vires*.

[9] Following his public statement, Gonzalez spoke in closed session. His speech retains its protected status.

See Givhan v. Western Line Consolidated School District, 1979, 439 U.S. 410, 99 S. Ct. 693, 58 L.Ed.2d 619. "When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered." *Id.* at 439 n. 4. We agree with the district court's conclusion that "there was nothing about the manner, time or place of Gonzalez's statement that would justify his dismissal". Gonzalez was polite throughout his exchanges with the Commissioners' Court. He did not launch personal attacks on the commissioners. At several points he offered to cooperate in amending the CAA procedures to meet the commissioners' wishes. As the district court found, Gonzalez's conduct could not be characterized as a "mini-insurrection". *Cf. Connick,* 461 U.S. at 141. The time and place were selected by the commissioners, who began their investigation with little warning to Gonzalez.

The district court found that Gonzalez's loyalties were divided. On the one hand, he served at the pleasure of the Commissioners' Court, which sought direct control over the CAA. On the other hand, Gonzalez was obliged to carry out federal policies designed to remove the CAA from local political influence. This conflict accurately describes Gonzalez's predicament. It is pertinent, but we need not rely on this finding because we conclude that Gonzalez's speech was entitled to First Amendment protection even if the Commissioners' Court is viewed as the sole government employer.

IV.

Our discussion suggests the familiar disadvantages of case-by-case balancing of First Amendment rights. Examination of the facts is difficult and time-consuming. In many cases judges are free to decide the case on a hunch. Because of this unpredictability, individualized balancing inevitably chills some protected speech even as it discourages government officials from acting vigorously against some unprotected speech. *See* T. Emerson, "Toward a General Theory of the First Amendment." 72 *Yale L.J.* 877, 913-14 (1962). Nevertheless, because public employees speak in a great variety of circumstances, individualized balancing seems preferable to a predictable but inflexible categorical approach. And in the context of such cases great reliance should be placed on the judicial discretion exercised by the trial judge in the fact-finding process. Here, on remand the trial judge faithfully followed the clear but demanding mandate of *Gonzalez I*.

For the reasons we have discussed, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2440

EDGARDO A. GONZALEZ, JR.,
Plaintiff-Appellee,

versus

C. Y. BENAVIDES, JR.,
Webb County Judges, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(November 21, 1985)

Before WISDOM, POLITZ and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-2440

EDGARDO A. GONZALEZ, JR.,
Plaintiff-Appellee,

v.

C. Y. BENAVIDES, JR.,
Webb County Judges, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

(Filed December 18, 1985)

ORDER:

The motion of Appellants for stay and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

The motion of Appellants for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 23, 1985, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * *

/s/ HENRY A. POLITZ
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-80-46

EDGARDO A. GONZALEZ, JR.,
Plaintiff,

v.

C. Y. BENAVIDES, JR., WEBB
COUNTY JUDGE, ET AL.,
Defendants.

(Filed August 27, 1981)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit filed against the County Judge and four County Commissioners of Webb County, Texas, both in their individual and official capacities. The Plaintiff claims that his employment was terminated under circumstances that violated his constitutional rights under both the First and Fourteenth Amendments to the United States Constitution. He therefore seeks relief under 42 U.S.C. § 1983. This case was tried before the Court on August 11-12, 1981. The Court now makes the following findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Findings of Fact

1. Plaintiff Edgardo A. Gonzalez, Jr. ("Gonzalez") was employed as Executive Director of the Laredo-Webb

County Community Action Agency ("C.A.A.") on or about March 20, 1979. He was terminated from that position by a unanimous vote of the County Judge and the four Defendant County Commissioners on June 23, 1980. At that time, he had been employed with the C.A.A. for approximately eleven years.

2. At all relevant times, the Commissioners Court of Webb County, Texas consisted of C. Y. Benavides, Jr., the County Judge, and Commissioners Richard G. Morales, Jr., Homero Mata, L. H. Guerra, Jr., and Arnulfo Santos.

3. As of 1970, the designated Community Action Agency for Webb County was the Webb County Commissioners Court. *See* Plaintiff's Exhibit 5-C; 42 U.S.C. § 2790(a). According to the organizational structure in effect at all pertinent times, the Webb County Commissioners Court was the governing board of the C.A.A. Under the governing board was a twenty-one person board known as the "Administering Board". (*See* Governing Regulations of the Administeirng Board, included in Plaintiff's Exhibit 5-B).

4. On or about May 9, 1979, Gonzalez decided to fire his Deputy Director, Oscar Chavez. He communicated this intention privately to at least two of the Defendants, Judge Benavides and Commissioner Guerra. Those Defendants each told Gonzalez to do whatever he thought was right, although Judge Benavides also told Gonzalez that the Commissioners Court would probably not agree with the firing (Plaintiff's Exhibit 1, pp. 278, 280). Gonzalez fired Chavez and Judge Benavides promptly caused to be added to the agenda for the Commissioners Court meeting of May 12, 1980 an emergency item described as follows:

"Personnel matters concerning C.A.A. and re-instatement of Oscar Chavez as Deputy Director of C.A.A." (Plaintiff's Exhibit 3-B).

5. On May 12, 1980 the Commissioners met in regular session and ultimately went into executive session to discuss the Chavez firing. Although Gonzalez was orally notified of the meeting, he was not specifically invited to enter the executive session nor did he do so. At the conclusion of the executive session on May 12, 1980, the Commissioners Court, through Judge Benavides, issued a statement to the effect that Gonzalez did not have the power to fire Chavez, that he purported to do so without consent or authority of the Commissioners Court, and that therefore the County Judge publicly reprimanded him for that action. The statement further indicated that Commissioner Morales was appointed to conduct a full investigation "in relation to the incident" and that notice of further meetings of the investigating committee would be posted on the bulletin board at the County Courthouse. The full text of the statement is reflected in Plaintiff's Exhibit 2. The reprimand of Gonzalez was disseminated to the public throughout the Laredo-Webb County area by all news media, including newspaper, radio, and television.

6. On or about June 13, 1980, a public notice was posted that the Commissioners Court would meet on June 16, 1980 and that one of the items to be considered in executive session was "Discussion on Executive Director and Deputy Director's job performances C.A.A." (Plaintiff's Exhibit 3-C).

7. The Commissioners Court did proceed to hear testimony from three witnesses on June 16, 1980 concerning

the operations of the C.A.A. Initially, Gonzalez and his attorney indicated a willingness for the Commissioners to hear these witnesses in executive session and outside of their presence. At approximately noon that day, however, Gonzalez' attorney delivered a letter to Judge Benavides stating that Gonzalez wished to have his attorney present "for the remainder of the investigation being conducted". He further asked for at least a one-day notice of the date and time of any future proceedings and asked for a transcript of those proceedings. (Plaintiff's Exhibit 8-A). At that point, the investigation ceased.

8. On June 18, 1980, Gonzalez' attorney submitted another letter to Judge Benavides asking to be placed on the agenda for the meeting of June 23, 1980 in order "to make a public statement regarding the investigation into the job performance of the Executive Director and Deputy Director of the Community Action Agency." Plaintiff's Exhibit 8-B.

9. On June 23, 1980, the Commissioners Court again convened to consider, *inter alia*, the job performance of Gonzalez and Chavez. Gonzalez delivered a formal public statement (Plaintiff's Exhibit 8-D) which was made a part of the record. Thereafter, he was initially allowed to enter executive session during which additional witnesses would be heard by the Commissioners Court. He was not allowed, however, to directly cross-examine witnesses but instead was told that if he had any questions to be directed at a witness, he should reduce his question to writing and give it to the presiding officer, Commissioner Morales.

10. After a few witnesses were heard on June 23, 1980, the attorney for Chavez suggested that the witnesses might feel more free to speak the truth if both

Chavez and Gonzalez and their attorneys left the room, so long as both parties would have an opportunity to later be provided with a transcript or listen to tape recordings of the proceedings. (Plaintiff's Exhibit 1, Page 21). Although Gonzalez' attorney appeared to agree with this suggestion (Plaintiff's Exhibit 1, Pages 26-27), no action was taken until two more witnesses were heard. At that point, a witness expressly stated that he and the other remaining witnesses would prefer to be heard "in the privacy of the Court". (Plaintiff's Exhibit 1, Page 37). A brief discussion then ensued, during which Gonzalez' attorney expressed a preference to remain present but insisted that if the parties were to be excluded, he should receive a transcript for the purpose of being able to ask questions at some later date. (Plaintiff's Exhibit 1, Page 40). The Commissioners then voted to exclude the parties from the remainder of the hearings, with Commissioner Guerra dissenting. (Plaintiff's Exhibit 1, Page 41). At that point, Gonzalez, Chavez and their attorneys were excluded from the proceedings for the remainder of the testimony. At approximately 5:30 p.m., after a total of twenty-six witnesses had been heard, the Commissioners then invited Plaintiff Gonzalez and his attorney into the executive session. Gonzalez was given another opportunity to make a statement and thereafter, a full discussion commenced between Gonzalez, his attorney, and the Commissioners. This discussion lasted until approximately 7:00 p.m. and is fully reflected on pages 259-301 of the transcript of the proceedings. (Plaintiff's Exhibti 1).

11. At the conclusion of the proceedings on June 23, 1980, the Commissioners voted unanimously to discharge Gonzalez as Executive Director. This decision was based solely upon the discussion between Gonzalez and the

Commissioners which occurred that day and was not based upon the testimony of any of the twenty-six witnesses that had been heard by the Commissioners.

12. As reflected by the transcript of the confrontation between Gonzalez and the Commissioners Court on June 23, 1980, Gonzalez first explained the reasons why he felt that his discharge of Chavez was warranted. He then took the view that the Commissioners Court did not have the legal right to evaluate his performance as Executive Director because this responsibility was vested in the Administering Board. The Commissioners took the position that if they had the right to fire Gonzalez, they inherently had the right to evaluate his job performance. After further discussion, Commissioner Morales summarized by describing what he perceived to be "an irreconcilable difference" between Gonzalez and the Court. (Plaintiff's Exhibit 1, Page 292). He repeated the position of the Commissioners Court that they had the absolute right to hire and fire the Executive Director. He specifically asked Gonzalez whether, regardless of his personal beliefs, he would publicly recognize that authority on the part of the Commissioners Court. (Plaintiff's Exhibit 1, Page 297). At this point, the Commissioners took a recess of twenty to thirty minutes to enable Gonzalez to confer with his attorney and determine his response to the request. After the recess, Gonzalez' attorney then announced the decision that Gonzalez felt he was being asked to agree with something that he considered to be a violation of policies and procedures and that he refused to do so. (Plaintiff's Exhibit 1, S.F. 300). The Commissioners then went into public session and voted to fire Gonzalez.

13. The parties agree that at all pertinent times, the Laredo-Webb County C.A.A. had in effect a manual of policies and procedures, admitted into evidence as Plaintiff's Exhibit 5-A. Chapter I, Section 2 thereof provided that the Commissioners Court had the power to employ the Executive Director and certain listed senior staff members, specifically including the Deputy Director. Chapter XII, Section 1 provided that, "the performance evaluation of the Executive Director shall be made by the Administering Board." Gonzalez interpreted this provision literally to mean that only the Administering Board could evaluate the performance of the Executive Director. The Commissioners Court interpreted this provision to mean that they had the concurrent inherent authority to evaluate the Executive Director because of their admitted exclusive authority to hire and fire him. Chapter XVI, Section 7 provided: "Any employee may be dismissed by the Executive Director . . . for cause." Gonzalez again interpreted this provision literally to give him the power to dismiss the Deputy Director. The Commissioners interpreted this provision to mean that the Executive Director could fire any employee *other* than those senior staff employees hired by the Commissioners Court. Chapter XVII, Section 3 created a personnel grievance procedure, generally requiring an employee to first go to his immediate supervisor, then to the Executive Director and finally to the Administering Board. Gonzalez took the position that this procedure was applicable to his termination by the Commissioners Court and indeed he attempted to appeal his termination to the Administering Board. After taking three different votes, that group declined to interfere with the decision of the Commissioners Court. Chapter XIX, Section 1 of the manual provided: "The Executive Director shall be hired by the

Commissioners Court of Webb County and shall serve at their pleasure."

14. When the Commissioners Court undertook to designate itself as the C.A.A. in 1970, it submitted a statement to the Office of Economic Opportunity to the effect that the governing board would exercise the power to appoint the staff director, among other things. The same form, however, also represented that the Administering Board would have "as a minimum" the right to reasonable advance notice of and an opportunity to make recommendations to the governing board concerning the exercise of all powers retained by the governing board. *See* Plaintiff's Exhibit 5-C, Appendix B.6, Sections 6b and c.

15. The by-laws of the Administering Board, Article III, Section I, acknowledged that all decision-making authority was retained by the Commissioners Court and that the Administering Board had all powers specifically delegated to it in writing by the Commissioners Court. Article IV, Sections VI and VII thereof specifically stated that the Executive Director and "all senior staff positions" shall be appointed by the Commissioners Court.

16. The Community Services Administration ("C.S.A.") issued C.S.A. Instruction 6400-01a which became effectime June 14, 1979. (Plaintiff's Exhibit 6-B). One of the purposes of this instruction was to strengthen the role of the C.A.A. boards as compared to C.A.A. staffs. This was explained by letter dated June 19, 1979 from the General Counsel of the C.S.A., Region VI, in which he stated that the new rule would require the by-laws of virtually every agency in the Region to be revised. (Defendants' Exhibit 1). In October, 1979, the Regional

Director wrote to Gonzalez, advising him that, among other things, the local C.A.A. had not revised its rules so as to provide that the Administering Board would participate jointly and concur formally in the selection of the Executive Director. (Defendants' Exhibit 2). Follow-up letters were sent in November, 1979, February, 1980, and as late as May 29, 1980 from the Regional Director to Gonzalez advising that Gonzalez had not responded to the October, 1979 letter and threatening to deny future funding to the local C.A.A. (Defendants' Exhibits 3-5). These urgings by the Regional Director and the underlying need to revise the local by-laws were never called to the attention of the Commissioners Court by Gonzalez until their confrontation in June, 1980. At that time, Gonzalez invoked the provisions of C.S.A. Instruction 6400-01a and advised the Commissioners that the local policies and procedures were in conflict with federal regulations.

17. After his termination, Gonzalez was unable to find permanent employment until on or about February 12, 1981. At that time he was employed by the Alamo Area Council of Governments in San Antonio, Texas. Through August 10, 1981, his net loss in salary was $21,951.15. The parties agreed at trial that the other damages calculations reflected on Plaintiff's Exhibit 11 are accurate except that Defendants do not agree that Gonzalez is legally entitled to recover any of these elements of damage.

Conclusions of Law

1. This is a suit against persons clearly acting under color of state law who allegedly deprived the Plaintiff of rights secured to him by the First and Fourteenth

Amendments to the United States Constitution, thus allegedly causing him damage. Plaintiff is entitled to bring such a suit under 42 U.S.C. § 1983 and jurisdiction is conferred on this Court by the provisions of 28 U.S.C. § 1343.

2. Plaintiff's first claim for relief is based on the proposition that his public reprimand and subsequent firing deprived him of liberty without due process of law, in violation of the Fourteenth Amendment. In the landmark case of *Board of Regents v. Roth,* 408 U.S. 564 (1971), the Supreme Court held that there might be cases in which the refusal of a governmental unit to re-hire a person might implicate a protected liberty interest, such as where the government made charges against the individual that "might seriously damage his standing and associations in his community." 408 U.S. at 573. The Court furnished examples such as charges of dishonesty or immorality, or efforts by the employer to bar the employee from obtaining other public employment. The Fifth Circuit has applied this reasoning in both termination and failure-to-rehire situations, holding that a liberty interest is affected when the circumstances are such that the employee is publicly subjected to a "badge of infamy". *Dennis v. S & S Consolidated Rural H. S. Dist.,* 577 F.2d 338 (5th Cir. 1978); *Kaprelian v. Texas Women's University,* 509 F.2d 133 (5th Cir. 1975). This Court concludes as a matter of law that there was nothing about the circumstances surrounding the ultimate discharge of Gonzalez that subjected him to a "badge of infamy" or constituted such a blight upon his reputation, honor or integrity as to constitute a deprivation of liberty. Accordingly, the Court holds that he has failed to establish any cause of action under the Fourteenth Amendment on that theory.

3. Plaintiff also claims relief on the theory that he was deprived of property, to-wit, his job, without due process of law. Again, the starting point for analyzing this claim is *Board of Regents v. Roth, supra.* There, the Supreme Court explained that "the range of interests protected by procedural due process is not infinite." 408 U.S. at 570. Instead, procedural due process is a safeguard for interests that a person has already acquired in specific benefits. *Id.* at 576. To have a property interest in a benefit, such as a job, a person must have more than an abstract need or desire for it and he must have more than a unilateral expectation of it. Instead, he must have a legitimate claim of entitlement to it. *Id.* at 577. Whether or not Gonzalez had a vested property interest in his job as Executive Director is not determined by the United States Constitution but is instead determined by the terms of his appointment. *Id.* at 577-578. In the instant case, it is undisputed that the Commissioners Court had the exclusive right to hire the Executive Director and that he held that position at their pleasure. In *United Steel Workers, Etc. v. University of Alabama,* 599 F.2d 56 (5th Cir. 1979), an employee handbook recited that the University had the "exclusive discretion" to exercise the customary functions of management, including the discretion to dismiss employees. 599 F.2d at 60. The Fifth Circuit observed that it could "hardly think of clearer words which could be used by management to reserve the right to hire and fire and discipline employees in the exercise of their discretion." *Id.* at 61. Accordingly, it was held that the employees had no legitimate claim of entitlement to their employment. If anything, the provisions of Chapter XIX, Section 1 of the Policies and Procedures Manual are even a clearer statement of the absolute discretion of the Commissioners to discharge the

Executive Director at will. To avoid this clear language, Gonzalez suggests that he had a property right in his job because the C.S.A. was insisting on revised by-laws to give the Administering Board more authority with respect to the hiring of the Executive Director. The Court disagrees. In the first place, there is nothing in the evidence to suggest that the C.S.A. was in any way challenging the authority of the Commissioners Court to fire the Executive Director. In the second place, the fact remains that the by-laws had not been revised at the time in question. That the C.S.A. might have ultimately carried out its threat to cease funding of the C.A.A. is immaterial to this analysis. Gonzalez also relies on the written provision that the Administering Board had the authority to evaluate his performance but the Court does not construe this provision as diluting in any way the absolute power of the Commissioners Court to discharge him. Finally, Gonzalez refers to the provisions establishing a grievance procedure. The Court interprets these procedures as applying to lower ranking employees and not to the Executive Director himself. In *McMillan v. City of Hazlehurst,* 620 F.2d 484 (5th Cir. 1980), the Fifth Circuit found no cause of action resulting from the summary termination of a police officer because of a Mississippi law providing that city employees "serve at the pleasure of governing authorities and may be terminated with or without cause." *Id.* at 485. Likewise, in *Moore v. Otero,* 557 F.2d 435 (5th Cir. 1977), the plaintiff policeman was found to have no property interest in holding the position of corporal because under state law "a corporal serves in that special capacity only at the pleasure of the chief of police and the mayor." 557 F.2d at 437. The corresponding provision pertaining to the Executive Director of the Laredo-Webb County C.A.A. is legally indistin-

guishable from those in *McMillan* and *Moore*. Plaintiff Gonzalez having no vested property interest in the position of Executive Director, his due process claim on that theory must also fail.

4. The fact that Plaintiff Gonzalez had no property interest in his job of Executive Director does not end the inquiry. Even though a person has no property right to a government job and therefore can be fired for no particular reason, he nevertheless can not be fired as retaliation for exercising his constitutional right to freedom of speech. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sindermann*, 408 U.S. 593 (1972). While at first blush this may seem an anomalous result to some, it is grounded on the basic premise that if a government can deny a benefit to a person because of his constitutionally protected speech, that person's exercise of freedom of speech would in effect be penalized and inhibited. This would allow the government to do indirectly what it cannot do directly. *Perry v. Sindermann*, 408 U.S. at 597. Of course, as is often true, applying the general rules to the facts of any particular case is not without difficulty. The United States Supreme Court has charged federal courts with the responsibility "to arrive at a balance" between the interests of the public employee in commenting upon matters of public concern and the interest of the governmental unit, as employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). In *Pickering*, the Supreme Court furnished general guidelines to be used in this balancing process. Were the employee's statements merely critical of certain policies of the employer or were they directed particularly towards persons with whom

the employee would normally be in direct daily contact? Is there evidence that the offensive statements themselves prevented the employee's superiors from maintaining discipline or disrupted harmony among co-workers? Was the working relationship between the employee and the employer of such a personal and intimate nature that any public criticism by the employee would seriously undermine the effectiveness of the working relationship? Were the offensive statements true or were they false and defamatory? Did the statements relate to a matter of legitimate public concern? 391 U.S. at 569-73. In a later decision, the Supreme Court held that the *Pickering* doctrine applies even when the employee communicates the offensive statements privately rather than publicly. *Givhan v. Western Line Consol. School,* 439 U.S. 410 (1979).

5. The first question to be resolved, therefore, is whether certain statements by Gonzalez were in fact protected speech under the First Amendment and, if so, whether the making of those statements was a substantial or motivating factor inducing the Defendants to fire him. *Brown v. Bullard Independent Sch. Dist.*, 640 F.2d 651 (5th Cir. 1981). Applying the *Pickering* criteria, *supra,* the Court concludes that the question must be answered affirmatively. The analysis is complicated somewhat by the fact that in examining the proceedings of June 23, 1980, it is difficult to pin down precisely the scope of the controversy between Gonzalez and the Commissioners. Gonzalez' public statement read earlier that day (Plaintiff's Exhibit 8-D) directed itself primarily to the argument that it was the function of the Administering Board to evaluate his job performance. Later that evening, however, in executive session, Commissioner Morales express-

ed the view that the "irreconcilable differences" between Gonzalez and the Commissioners also stemmed from a second source, namely Gonzalez' view that he had the power to fire his Deputy Director. (Plaintiff's Exhibit 1, Page 285). Commissioner Guerra, however, indicated that the Chavez firing was no longer an issue. (Plaintiff's Exhibit 1, p. 278-9). Later in the discussion, Commissioner Morales framed the issue in terms of whether or not the Commissioners had the power to "hire and fire" Gonzalez (Plaintiff's Exhibit 1, Page 293), a point never seriously challenged by Gonzalez. Finally, when Gonzalez made his ultimate statement after consulting with his attorney, he phrased the conflict in terms of "being asked to agree with something that is in violation of the policies and procedures as they have been approved, by the Webb County Commissioners' Court." He then suggested the existence of still another point of controversy, namely whether or not the Deputy Director had violated grievance procedures at the time that he was discharged by Gonzalez. (Plaintiff's Exhibit 1, Page 300). Regardless of whether the termination was based on all or only some of the foregoing disputes, it is nevertheless clear that neither Gonzalez' public statement nor anything he said in executive session constituted a personal attack on any member of the Commissioners Court. Instead, the dialogue evidenced what seems to have been an honest difference of opinion as to the interpretation of some rather ambiguous written policy provisions. Certainly it cannot be said that Gonzalez' statements were false, much less malicious. To the extent that he claimed the right to fire his Deputy Director, he was clearly supported by Chapter XVI, Section 7 of the policy manual. To the extent that he argued that his performance should be evaluated by the Administering Board, he was clearly

supported by the literal language of Chapter XII, Section 1 of the manual. To the extent that he argued that his Deputy Director had circumvented grievance procedures, he was supported by Chapter XVII, Section 3 of the manual. The Court does not mean to suggest, and has no need to hold, that the contrary interpretations by the Commissioners were necessarily incorrect. The point is simply that Gonzalez' statements were in no way false or reckless. The subject matter of the statements would clearly seem to be a matter of public concern. The C.A.A. had been responsible for distributing millions of dollars in the community over many years. Gonzalez told the Commissioners that if he were to make a public statement agreeing with their interpretation of the regulations, future funding of the C.A.A. might be in jeopardy. The Court cannot say that this belief was totally unfounded and if there were any merit to it, it would certainly be a matter of public concern. Additionally, the main argument centered around the power of the Commissioners Court vis-a-vis the Administering Board. Under the statutory scheme, the Administering Board is a vital component and Congress was careful to specify that at least one-third of those Board members must be persons chosen in accordance with democratic selection procedures to assure that they are representatives of the poor in the community. 42 U.S.C. § 2791(b). While the Administering Board did not attempt to directly challenge Gonzalez' firing, it apparently did express strong displeasure with the action of the Commissioners Court in what was described by the news media as a lengthy, heated meeting (see Plaintiff's Exhibits 9-O, 9-P). Again, therefore, it cannot be said that this dispute was not a matter of some legitimate public concern. Nor is there any evidence in this record that the day-to-day working rela-

tionship between Gonzalez and the Commissioners Court was of such a personal and intimate nature as to cause his public criticism to seriously undermine the effectiveness of that relationship. *Cf. Abbott v. Thetford,* 534 F.2d 1101 (5th Cir. 1976) (en banc), adopting Judge Gewin's dissenting opinion at 529 F.2d 701. On the contrary, according to the orientation manual (Plaintiff's Exhibit 5-B), one of the responsibilities of the Administering Board is to supervise the Executive Director, and the Executive Director is held "ultimately responsible to the Board for staff performance." (See "Administering Board" Tab, P. 1). Likewise, there was nothing about the manner, time or place of Gonzalez' statements that could be considered personally threatening or offensive to any of the Commissioners. No evidence was presented to suggest that Gonzalez' insistence on being evaluated by the Administering Board rather than the Commissioners Court actually disrupted the operations of the C.A.A. or caused any dissension or morale problems in that organization. Defendants argue that Gonzalez was fired because of insubordinate conduct. Specifically, in a post-trial brief, Defendants suggest that Gonzalez was fired because of an unwillingness to implement major personnel directives of the Commissioners Court, a refusal to carry out directions "as regards other senior staff members" and a refusal to recognize the authority of the Commissioners. The evidence does not support that argument. True, Gonzalez attempted to discharge his deputy and the Commissioners overruled that decision. When Gonzalez announced his intention to fire the deputy, however, the initial reaction of some of the Defendants was ambiguous at best. Gonzalez was never ordered not to fire Chavez and indeed Commissioner Guerra had told him to "do what you feel is right" (Plaintiff's Exhibit

1, p. 278). Judge Benavides expressed a similar notion, although he predicted that the Commissioners would not like the action. When the Commissioners subsequently reinstated the deputy, there is no evidence that Gonzalez refused to abide by that decision even though he did not agree with it. Moreover, assuming the Commissioners correctly believed that they had an implied, concurrent right to evaluate Gonzalez' performance, there is no evidence that he interfered with that right. On the contrary, the Commissioners conducted a rather exhaustive evaluation hearing. Gonzalez was not fired for disrupting or interfering with this hearing. Thus there is absolutely no evidence that Gonzalez disobeyed or violated any order or directive of the Commissioners. He merely expressed the opinion that certain conduct by the Commissioners was contrary to proper procedures and was fired for failing to retract that statement. In summary, the following language from *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979), is relevant:

> "The First Amendment generally favors the marketplace testing of ideas and information rather than their arbitrary control by the government. As it is, the government itself, and especially its top officials, speak loudly in our society. Such volume is tolerable in part because the government does not speak in one voice. The First Amendment ensures that under most circumstances even the most junior government clerk-typist can criticize the speech and acts of the top officials in her office as freely as any citizen can . . . Thus, *Pickering* states that the First Amendment requires the government not just to show that certain employee speech injures the government, but to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society." 592 F.2d at 779.

Defendants made no such showing with respect to Gonzalez' speech.

6. The Court has concluded that Gonzalez' exercise of his First Amendment rights was a substantial or motivating factor inducing the Commissioners to fire him. The Commissioners may still prevail, however, if the evidence shows that they would have fired Gonzalez even in the absence of his protected speech. *Mr. Healthy City Board of Education v. Doyle, supra; Brown v. Bullard Independent Sch. Dist., supra.* Resolution of this issue is considerably more simple. At the trial, the Commissioners in effect stipulated that the sole and only reason they fired Gonzalez was because he would not agree with their interpretation of the regulations. Judge Benavides specifically testified that Gonzalez would still be the Executive Director today had he agreed with the Commissioners. Commissioner Morales testified that Gonzalez was not fired because of anything said by any of the twenty-six witnesses at the June 23, 1980 hearing and that in fact as many witnesses as not gave testimony favorable to Gonzalez' job performance. The parties agreed that there were no other incidents documented in Gonzalez' personnel file which would have caused the Commissioners to fire him. Under these circumstances, therefore, the Court concludes that Gonzalez has proved a cause of action for a retaliatory discharge in violation of the First and Fourteenth Amendments.

7. Having concluded that the Plaintiff must prevail, the Court now considers the issue of Defendants' qualified immunity from personal liability. When a plaintiff seeks damages under § 1983 resulting from a discretionary action by a public official who must exercise an exceedingly broad range of discretion in performing his official

duties, such as these Defendants, the official should be entitled to qualified immunity upon a showing that he acted within the scope of his discretionary authority. *Douthit v. Jones,* 619 F.2d 527 (5th Cir. 1980). The Court is satisfied that the Defendants have made such a showing in this case. The burden then shifts to the Plaintiff to show one of two things. First, that the Defendants had a subjective bad faith intent to harm him or, second, that the Defendants knew or should have known that their action infringed a clearly established constitutional right. *Barker v. Norman,* No. 80-1288, slip op. at p. 9678 (5th Cir. Jul. 30, 1981). There is absolutely no evidence that these Defendants bore any subjective ill will towards the Plaintiff and, at the trial, Plaintiff so conceded. The Court also concludes that the Plaintiff has failed to satisfy the second test. While the Plaintiff's constitutional right to freedom of speech was clearly established, there is no evidence that the Defendants knew they were infringing upon this right and insufficient evidence that, under the circumstances, they should have known. As the Court has already explained, these cases involve a delicate balancing of competing interests. It has long been "settled law" that one cannot be fired for exercising his First Amendment rights, but determination of whether a constitutional violation has occurred in any given case necessarily turns on the peculiar facts of that case. Indeed, the United States Supreme Court recognized this principle in *Pickering* when it said:

> "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a

> general standard against which all such statements may be judged." 391 U.S. at 569.

If the United States Supreme Court finds it unfeasible to lay down a general standard for judging all statements, it would not be fair or reasonable to expect the Defendants to do better. Accordingly, Defendants are each entitled to the defense of qualified immunity and shall not be personally liable to the Plaintiff, They shall, however, be liable in their official capacities. Inasmuch as the County Judge and County Commissioners are the ultimate governing body for the County of Webb, their acts may fairly be said to represent official County policy. *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980). *See Collins v. Thomas,* No. 79-3360, slip op. at p. 8940 (5th Cir. July 10, 1981). Webb County is not entitled to assert the defense of qualified immunity. *Owen v. City of Independence,* 445 U.S. 622 (1980).

8. The final issue involves a determination of the relief to be afforded to the Plaintiff. As a general proposition, the constitutional principle at stake is sufficiently vindicated if the employee is placed in no worse a position than if he had not engaged in the protected conduct. *Mt. Healthy City Board of Education,* 429 U.S. at 285. This generally requires the awarding of back pay together with the equitable relief of mandatory reinstatement. In this case, however, the Plaintiff has not been the Executive Director of the C.A.A. for more than a year and that position has presumably long since been filled by someone else. Mandatory reinstatement would therefore necessitate the forcible removal of that successor. Moreover, the Plaintiff is now working in San Antonio and has been at his new job for over six months. Very likely for those reasons, the Plaintiff has suggested that he could be made

whole by what he refers to as "front pay", that is, the awarding of a future salary differential until such time as his earnings at the new job equal his former salary. The Court concludes that this is the more reasonable and equitable manner in which to resolve this case. The Court therefore concludes that the Plaintiff could be made whole by the award of $29,532.53 in back pay, $3,951.21 in lost fringe benefits and $2,670.36 for annual leave earned but not paid. The fringe benefits are calculated at the agreed rate of eighteen percent (18%) times the net salary loss of $21,951.15. While the Court believes it is reasonable to award Plaintiff the requested 9% interest on lost wages, it is not reasonable to use this higher figure as the basis for calculating loss of fringe benefits. Likewise, the Court makes no award for alleged loss of insurance, finding that this would be covered under the fringe benefit award. The Court also concludes that Plaintiff's claim for moving expenses, "employment seeking expenses", additional housing costs and "personal expenses" is not warranted. Plaintiff is, however, also awarded the additional sum of $9,575.00 as front pay to compensate for the salary differential between his former and present jobs, in lieu of reinstatement. The Court further concludes that the evidence does not support Plaintiff's claim for loss of future retirement benefits. To the extent that Plaintiff has lost past contributions by Webb County for this fund, that item would be covered under the fringe benefits award. There is no evidence other than Plaintiff's Exhibit 11 to support this claim but apparently Plaintiff cashed in his Individual Retirement Account and is now claiming the differential between what he received as compared with the present value of what he would have received had he continued making the maximum contribution until age 65. There is no explanation as to why the Plaintiff

would have been required to terminate his IRA merely because of his discharge. The proposition that the Plaintiff would have made maximum contributions to such a fund until age 65 and that the County would have matched such a contribution for that length of time is too speculative to justify an award on that basis. In summary, the Court concludes that an award of $45,729.10 would fully compensate Plaintiff for the damages sustained by him.

9. Plaintiff is the prevailing party in this suit and therefore, as part of court costs, is entitled to recover his reasonable attorney's fees. 42 U.S.C. § 1988. Within twenty (20) days from the entry of final judgment, Plaintiff shall file a detailed affidavit discussing the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Within twenty (20) days thereafter, Defendants shall file a controverting affidavit, stating with particularity any dispute they have with the facts set forth in Plaintiff's affidavit. Depending on what factual disputes exist at that point, the Court will determine whether a further hearing on that issue is required.

10. To the extent that any of the foregoing Findings of Fact shall be deemed to be Conclusions of Law, and vice-versa, they are hereby adopted as such.

DONE at Laredo, Texas, this 27th day of August, 1981.

/s/ GEORGE P. KAZEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-80-46

EDGARDO A GONZALEZ, JR.,
Plaintiff,

v.

C. Y. BENAVIDES, JR., WEBB
COUNTY JUDGE, ET AL.,
Defendants.

(Filed August 27, 1981)

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law, it is ORDERED that the Plaintiff, Edgardo A. Gonzalez, Jr., do take nothing from the individual defendants, namely C. Y. Benavides, Jr., Richard Morales, Jr., Homero Mata, L. H. Guerra, and Arnulfo Santos. It is further ORDERED that Plaintiff shall recover from the same defendants in their official capacities the sum of Forty Five Thousand Seven Hundred Twenty-Nine and 10/100 Dollars ($45,729.10), to be paid by the County of Webb, Texas.

Court costs are taxed to the Defendant County.

DONE at Laredo, Texas, this 27th day of August, 1981.

/s/ GEORGE P. KAZEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
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Plaintiff,

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C. Y. BENAVIDES, JR., Webb County Judge, et al.,
Defendants.

MEMORANDUM AND ORDER

Pending before the Court is Plaintiff's Motion for Attorney's Fees, pursuant to 42 U.S.C. § 1988. The motion is supported by affidavits and detailed time sheets. Defendants filed a lengthy written opposition to the motion. Additionally, the Court held a hearing on November 5, 1981, to hear further arguments from the attorneys. The Court will now evaluate the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

1. Plaintiff hired two attorneys, Luis Segura of San Antonio, and Oscar M. Laurel, Jr. of Laredo. Segura claims 317.95 hours of time expended and Laurel claims 304.85 hours. The Court is directed to weigh the hours claimed against its own knowledge, experience, and evaluation of the time required to complete similar activities. If more than one attorney is involved, the Court must scrutinize the possibility of duplication of effort along with the proper utilization of time. The Court must also distinguish between legal work, in the strict sense, and

work that can be accomplished by non-lawyers. *Johnson*, 488 F.2d at 717. Defendants correctly contend that the award of attorney's fees should be proportionate to the extent to which Plaintiff has prevailed. *Familias Unidas v. Briscoe*, 619 F.2d 391, 405 (5th Cir. 1980). While the Defendants have noted general areas of disagreement with Plaintiff's claim, they have not attempted to show precisely which hours claimed are excessive or pertain to unsuccessful issues. Accordingly, the Court is left to its own careful review of the fee statements and of the complete file in the case, over which this Court presided from start to finish. Plaintiff unquestionably prevailed against the Defendants but only on one of several theories. From the outset, responding to a motion to dismiss on the pleadings, the Court observed that Plaintiff seemed to be relying on several theories but it was difficult to determine precisely what was the basis of the claim. *See* Order of August 21, 1980. It appears that the Plaintiff spent a great deal of time and effort attempting to prove that he had a vested property interest in the job in question and also attempting to prove that his discharge was accomplished under such circumstances as to deprive him of a protected liberty interest. The Court ultimately rejected both of these theories and concludes that they should have never been seriously pursued in the first place. Plaintiff prevailed on the proposition that he was fired for exercising his First Amendment right to free speech. In retrospect, this was a relatively simple issue to present factually, and the Court is convinced that the case could have been presented on stipulated facts with little difficulty. This is because the Plaintiff was discharged at the conclusion of a Commissioners Court session that was transcribed by a court reporter and there-

fore there was really no way for either side to dispute what was said and done on that occasion. Of course, the Court realizes that hindsight is much clearer than foresight and concedes that Plaintiff was not unreasonable in conducting some amount of discovery to at least explore the possibilities of developing other issues and being certain that there were no other contested facts in the case. At the same time, however, it is clear that considerable time was spent pursuing these unfounded theories. Moreover, the documented hourly statements of the two lawyers seem grossly overburdened with time spent on research, conferences, and meetings with each other. For example, of Mr. Segura's claimed 317 hours, fewer than 60 seem to directly involve participation in depositions, trial, pre-trial hearings, or direct preparation for same. The same is generally true for Mr. Laurel. Additionally, while Plaintiff is certainly entitled to hire as many attorneys as he desires, and from wherever location he desires, the Court is concerned by the obious repeated duplication of effort between the two lawyers. Additionally, each lawyer claims considerable hours for travel. Most often, Mr. Segura claims time for traveling to and from Laredo but also Mr. Laurel claims time for traveling to and from San Antonio to confer with Mr. Segura. The Court feels that while it will allow actual travel expenses, it is not reasonable to require the Defendants to also pay the full legal rate for travel time. As a further, but very clear, illustration of the duplication and excessiveness of time claimed, attorney Segura claims 14.5 hours for preparing the petition for attorney's fees while attorney Laurel claims an additional 12.9, making the total in excess of 27 hours for that relatively modest task. This time claimed presumably in-

cludes time spent on a motion for "interim attorney's fees", with supporting brief. This motion urges the Court to fix an estimated attorney's fee for the forthcoming appeal in this case and argues that the Court somehow has the power to force the Defendants to pay the estimated fee right now, despite the pendency of their appeal. The Court finds such a motion to be utterly without merit. In summary, after most carefully analyzing these statements and giving the Plaintiff the burden of all possible doubts, the Court concludes that the reasonable amount of hours expended by attorney Segura is 175 and the reasonable amount expended by attorney Laurel is 125.

2. The general legal principles inolved in this case were neither novel nor different. Nothing in the Plaintiff's contentions or the Court's holding made "new law". Of course, the fact situation could be characterized as "novel" in the sense that most every fact situation is at least slightly different from every other fact situation, but the Court finds nothing under this factor to either increase or decrease the fee award.

3. Attorney Segura is a competent, experienced lawyer who apparently enjoys an excellent reputation in the San Antonio area in handling civil rights cases, particularly in the employment area. Aside from the inclination to push several dubious theories when one good one would suffice, an inclination hardly peculiar to him, Mr. Segura's overall work product, preparation, and general ability before the Court was excellent. Attorney Laurel is a new attorney, having been licensed in 1980 and the Court has little basis for evaluating his ability, inasmuch as he sat "second chair" throughout the proceedings and he apparently functioned as an assistant to Mr. Segura.

4. Plaintiff's attorneys have not alleged that they lost any other business because of a conflict of interest or because of their preoccupation with this case.

5. The Court's experience indicates that the prevailing fee for experienced attorneys in this area would be from $75.00 to $100.00 per hour, depending on the nature of the work being performed. For brand new attorneys, the prevailing fee would range between $50.00 to $75.00. This experience is confirmed by the evidence that attorney Oscar J. Pena, a most capable and experienced attorney, billed the Defendants at a rate of $75.00 per hour. In this case, the parties have stipulated that the reasonable compensation for attorney Segura would be $95.00 per hour and for attorney Laurel would be $65.00 per hour. The Court finds such stipulation to be eminently fair.

6. The fee in this case is contingent, but not in the sense that Plaintiff agreed to pay a stipulated percentage of his recovery to his attorneys. Instead, the agreement was that Plaintiff would owe no fee if he did not prevail and if he did prevail, the attorneys would receive whatever fee was awarded them by the Court. The Court believes that the hourly rate stipulated by the parties is reasonable enough to also compensate Plaintiff's attorneys for the extra consideration which should be given because of the contingency of the fee. The stipulated hourly rate is on the high side of the customary range and the amount of time allowed, even after discounting duplication and time spent on losing theories, still includes substantial amounts of time spent outside of trial or pre-trial discovery, as distinguished from office work and research.

7. There is no evidence of [illegible] priority work or unusual time limitations involved in this case.

8. This case did not involve any class action or "across-the-board discrimination". The Plaintiff did prevail on one of several theories and did recover some, but not all, of the relief which he sought.

9. The Court has already discussed the experience, reputation and ability of the attorneys in paragraph 3. There is no allegation or evidence of any "undesirability" of this case, as that term is used in *Johnson*. Plaintiff's discussion of this factor pertains to the proposition that there are supposedly a low percentage of plaintiff victories in civil rights cases and that they have been working without compensation since the inception of the case. These elements would relate to the contingency of the fee and not to the undesirability of the case.

10. Neither attorney had any professional relationship with the Plaintiff until this controversy began in June, 1980. Attorney Laurel is the nephew of the Plaintiff. There is no evidence under this factor that would cause the Court to increase or decrease the awarded fee.

11. Neither side presented evidence of the amount of awards in similar cases in this Circuit. The Court's own experience and research indicates that the stipulated hourly rate in this case would be well within precedential guidelines.

12. Each attorney has also presented a detailed expense bill, the combined total of which exceeds $4,000.00. Again, it appears to the Court that a good number of these items might well have related to work on unsuccessful theories or work which was simply not necessary. In the absence of any specific challenge from the Defendants, however, the Court will only delete those items which seem unquestionably unwarranted, and give Plain-

tiff the benefit of the doubt on all others. The Court starts with the proposition, based on its own experience and its knowledge of the economics of many law firms, that a fair hourly rate is designed to not only compensate the attorney for his own personal time but also for built-in overhead, such as expense of his secretaries and of his photocopying machine. Thus, the Court makes no award for "secretarial time" nor for photocopies. The Court also believes it unfair to tax Defendants with items listed as "miscellaneous expense". Further, the Court knows that Plaintiff issued subpoenas to various news media persons ostensibly to have them testify at trial as to the publicity given Plaintiff's discharge. These people did not testify, the matter was stipulated, and considering the nature of the stipulated evidence, it did not tend to prove anything helpful to Plaintiff's case. Accordingly, the Court also will deduct for these expense items reflected on attorney Laurel's bill for the period of August 16-18, 1981. The Court also deletes an item on attorney Segura's bill for "contract services for research" and also for research material from the Bureau of National Affairs. The Court is awarding ample time for research performed by the two lawyers in question, without adding more costs for contracted research. In sum, the Court deducts $331.71 from Mr. Segura's bill, leaving a total of $1,485.19 and deducts a total of $1,101.91 from Mr. Laurel's expenses, leaving a total of $1,322.48, for a total expense allowance of $2,807.67.

Summary

The Court concludes that a reasonable attorney's fee award in this case would be the sum of $16,625.00 (175 hours at $95.00 per hour) plus $1,485.19 expenses

for attorney Segura. The Court finds that a reasonable attorney's fee would also include the amount of $8,125.00 (125 hours at $65.00 per hour) for attorney Laurel plus expenses in the amount of $1,322.48. It is therefore ORDERED that Plaintiff's Motion for Attorney's Fees is hereby GRANTED. Plaintiff is awarded the sum of $27,557.67 as attorney's fees and expenses, to be taxed as court costs against the Defendants in their official capacity.

DONE at Laredo, Texas, this 20th day of November, 1981.

/s/ GEORGE P. KAZEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-80-46

EDGARDO A. GONZALEZ, JR.,
Plaintiff,

v.

C. Y. BENAVIDES, JR., ET AL.,
Defendants.

(Filed July 10, 1984)

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 7, 1983, the United States Court of Appeals for the Fifth Circuit issued its mandate remanding this case to the District Court. Unfortunately the file was thereafter lost in the mails and did not arrive at the District Clerk's Office until on or about November 28, 1983. The Court promptly issued an order directing the parties to advise how they wished to respond to the Fifth Circuit's opinion. Tragically, on December 4, 1983, Mr. Luis M. Segura, lead counsel for Plaintiff, was killed in an automabile accident, causing a further delay. In January, 1984, the parties advised by separate letters that neither side desired to present additional evidence and suggested that the case be decided on briefs. By March 1984, the briefs were filed and this Court has now had an opportunity to read those briefs, re-examine the original record, and reflect on the questions raised by the Fifth Circuit opinion. The Court now makes these Supplemental Findings of Fact and Conclusions of Law.

At the outset, this Court readopts all findings of fact which it originally made on August 27, 1981. The Court believes that those findings are amply supported by the record and does not construe the opinion in *Gonzalez v. Benavides*, 712 F.2d 142 (5th Cir. 1983) as setting aside any of those fact findings.

The Fifth Circuit concluded that the decision in *Connick v. Myers*, 103 S. Ct. 1684 (1983), added a new factor to be weighed in balancing the interests of a public employee in commenting on a matter of public concern versus the government's interest in promoting the efficiency of the public services it performs through that employee.

In *Connick*, the Supreme Court found that most of the issues raised by the employee involved only private interests. "In this case, with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of 'public concern'." 103 S. Ct. at 1690. Here, this Court has found and again finds for the same reasons stated in some detail earlier, (see Appellate Record, page 253), that the offending statement by Gonzalez involved a matter of substantial public concern.

Regarding the one issue in *Connick* found to be of public concern, the Court then turned to the question of whether the employer was justified in discharging the public employee. *Connick* makes it clear that the burden of showing justification is upon the employer. While this burden "varies depending upon the nature of the employee's expression", 103 S. Ct. at 1692, the Court cautioned that, "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." 103 S. Ct. at 1692-93. The *Connick*

court then concluded that since Myers' questionnaire "touched upon matters of public concern" in only a most limited sense", 103 S. Ct. at 1693, her employer was not required to tolerate action "which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." 103 S. Ct. at 1694.

Before proceeding to evaluate the instant case in light of *Connick*, it is helpful to again focus on the essence of the "irreconcilable difference" which developed between Gonzalez and the Commissioners' Court. The conflict began when Gonzalez fired his chief deputy, an action seemingly authorized by Chapter XVI, Section 7, of the Policies and Procedures Manual, (Plaintiff's Exhibit 5A), and an action taken only after two of the Defendants were first consulted. Nevertheless, the Commissioners soon converted the issue to one of evaluating the job performance of Gonzalez himself. It was this latter action that was challenged by Gonzalez in his public statement of June 23, 1980, (Plaintiff's Exhibit 8D), in which Gonzalez called to the attention of the Commissioners the provision of Chapter XII, Section 1 of the Manual, which explicitly stated that "[t]he performance evaluation of the Executive Director shall be made by the Administering Board." Other than that assertion, the public statement simply protested the alleged lack of adequate notice given to Gonzalez of his reprimand and of the fact that he himself was now being investigated. Nevertheless, Gonzalez' statement offered to "cooperate and participate" in the investigation, asking only for certain procedural protections such as right to counsel, right to cross examine witnesses, and the recording of testimony. At no time did Gonzalez ever challenge the fact that the County Commissioners had the ultimate authority to fire him. (*See* PX 1, page 299).

The clearest articulation of what the Commissioners demanded from Gonzalez came from Commissioner Morales, who insisted that Gonzalez publicly recognize, first, that the Commissioners had the right to block the firing of the deputy, and second, that the Commissioners had the right to evaluate Gonzalez' performance at any time they wished. (Plaintiff's Exhibit 1, page 285). Gonzalez, in turn, relied on the clear provisions of the Policies and Procedures Manual, which at least on their face would indicate that the Commissioners were wrong on both scores. However, Gonzalez reflected no insubordinate attitude whatever. On the contrary, he indicated that if the Commissioners wanted to change the written procedures he would sit with them to "come up with something that (sic) to your agreement". (PX 1, page 283). Further, through his attorney, he expressed concern that the issue was not "so cut and dry as the Commissioners' Court seems to think that it is". (PX 1, page 288). He suggested that the parties seek assistance from the Community Services Administration to obtain a clarification as to the powers and authority of the Commissioners *vis-a-vis* the Administering Board. He expressed the view that the question was "definitely something that can be worked out" and urged patience, stating that, "I don't think it's right for something as important as this to be decided just because everybody is tired." *Id.* The Commissioners rejected this approach, indicating that they were not interested in CSA guidelines and that if the CSA were to rule that their interpretation of the law was incorrect, they would abandon the agency rather than submit. (PX 1, page 289).

As in *Connick*, this Court concludes that there has been no demonstration that Gonzalez' public statement

of June 23, 1980, and his refusal to retract same, impeded his ability to perform his duties as Executive Director. Indeed, Defendants make no serious suggestion to the contrary. Judge Benavides specifically testified that Gonzalez would still be the Executive Commissioner today had he agreed to the public retraction. Commissioner Morales testified that nothing said by any of the 26 witnesses summoned to the hearing of June 23, 1980 led to the termination of Gonzalez and that in fact as many witnesses as not gave testimony favorable to Gonzalez. Unlike *Connick*, the Court further concludes that nothing Gonzalez did constituted a "mini-insurrection" or an act of insubordination which interfered with working relationships. There is not the slighest hint that Gonzalez made any effort to stir up animosities among other employees or, attempted to create any friction between members of the Administering Board and the Commissioner's Court. He drafted a formal written statement and asked permission of the County Judge to make the statement at the June 23, 1980 meeting. (PX 8B). That permission was granted. The remainder of the dialogue was conducted in an executive session, and it is clear from the transcript of same that Gonzalez was in no way insubordinate or disruptive. In fact, he rarely spoke himself. Whenever his attorney could get a word in, his thrust was to express the sincere conviction that the position taken by the Commissioners was legally incorrect, that it would jeopardize further funding of the program, and that the matter should be resolved amicably by seeking guidance from the Community Services Administration. With respect to firing of the Deputy Director, Gonzalez gave advance notice to at least two Defendants, the County Judge and Commissioner Guerra. Even when the

Commissioners rebuffed Gonzalez by reinstating the Deputy, there is absolutely no evidence or contention that Gonzalez refused to abide by that decision, despite his disagreement with it. Moreover, even though Gonzalez believed that in the first instance it was the Administering Board which had the duty of formally evaluating his own performance, he in no way interferred with the Commissioners doing so themselves.

Based on the foregoing facts, the Court also concludes that there was nothing about the manner, time or place of Gonzalez' statement that would justify his dismissal. For example, he did not circulate among other employees any petitions supporting his view or opposing that of the Commissioners Court. He did not incite members of the Administering Board to confront the Commissioners' Court. Defendants have presented no evidence that anything Gonzalez did actually disrupted the operations of the agency or caused any dissension or morale problems. Neither his public statement nor his conduct in the private executive session was hostile, insulting or threatening in any way.

In summary, evaluating the facts of this case under the *Connick* approach, this Court finds and concludes that Gonzalez was discharged for speaking on a matter of substantial, as contrasted from limited, public concern, and that the Defendants have utterly failed to prove anything about the time, manner or place of this speech that would disrupt the office, undermine the employer's authority, or destroy close working relationships.

The inquiry, however, is not concluded. While *Connick's* analysis of insubordination, disruption of working relationships, and undermining of authority does not

seem significantly different from *Pickering*'s anlaysis of whether an employer and employee have "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning," 391 U.S. at 570, nevertheless the Fifth Circuit in *Gonzalez* has held that *Connick* makes an incremental contribution to *Pickering*. Thus, the *Gonzalez* court correctly observes that those cases do not "address the discharge of a person who functioned as the chief executive officer and expediter of policy and who was terminable at the will of his elected employer." 712 F.2d at 147. The court then alludes to the "policymaker" approach of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), and asks this Court to determine whether Gonzalez' relationship with the Commissioners "fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." 712 F.2d at 150. If so, the Court is to weigh Gonzalez' free speech rights against "its impact upon the relationship and that relationship's role in the elected official's discharge of his duties." *Id.*

The Court concludes that Gonzalez is a policymaking employee under the *Elrod* test. As the Fifth Circuit has already indicated, he was the chief executive officer in the organizational scheme, with the day-to-day responsibility of implementing policies and procedures. He had the responsibility of hiring, supervising, training and evaluating most, if not all, of the other employees. He had broad discretionary responsibilities with broad and loosely defined objectives. He was not merely an adviser, but instead formulated plans for the implementation of broad goals.

This "policymaker" finding must now be factored into the *Pickering-Connick* balancing act. Even in the political firing context, the finding that one is a policymaker is no longer controlling. Instead, as stated in *Branti*:

> ". . . the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

445 U.S. at 518. Put another way, the Supreme Court held in *Branti* that an employee's First Amendment rights must yield to the government's interest in maintaining effectiveness and efficiency only when his "private political beliefs would interfere with the discharge of his public duties." 445 U.S. at 517. The same test should apply in the instant case. The Court believes that this conclusion is in harmony with the Fifth Circuit opinion, which expressly declined to hold that all speech by a policymaker is unprotected, instead holding that the particular speech must be weighed against its impact on his relationship with his employer and the relationship's role in the elected official's discharge of his duties. Again, because Gonzalez' statement touched on a matter of public concern, the Defendants bear the burden of justifying the discharge and that burden is greater if the employee's statement more substantially involves matters of public concern, as it did here. *Connick v. Myers, supra; see also Bueno v. City of Donna*, 714 F.2d 484, 488-91 (5th Cir. 1983); *Burris v. Willis Independent Sch. Dist., Inc.*, 713 F.2d 1087, 1095-6 (5th Cir. 1983). The Court concludes that Defendants have failed to meet their burden in this case.

As the Supreme Court observed in *Connick*, these cases arise out of an "enormous variety of fact situations", and no general rule can be applicable in all cases. 103 S. Ct. at 1694. In this case, although Gonzalez was unquestionably a "policymaker", it is crucial to note that in reality he was a man serving two different masters, the Administering Board and the Commissioners' Court. Admittedly, the Policies and Procedures Manual provided that the Executive Director was hired by the Commissioners' Court to serve "at their pleasure". That same manual, however, also explicitly provided that the performance evaluation of the Executive Director "*shall* be made by the Administering Board". Although the Commissioners' Court reserved the right to hire the deputy director, the manual explicitly provided that the Executive Director could dismiss *any* employee for cause. In April 1979, a year before the events in issue, Gonzalez prepared and conducted an "orientation" for the Commissioners' Court, designed to brief new Commissioners on the structure and operations of the local agency. (*See* PX 5B). Listed as one of the "functions" of the Commissioners' Court in that document is the approval of all plans and priorities for the program, but only after they are first "initiated" at the neighborhood level and then presented to the Administering Board for its approval. The Commissioners' Court would then ratify the action of the Administering Board. Among the duties and responsibilities of the Administering Board were hiring of staff positions, other than senior staff, hearing all grievances and making a "final" ruling thereon, negotiating and executing all contracts with delegate agencies, drawing boundary lines for election of representatives from "the poor", preparing applications for agency programs, issu-

ing payroll and accounts payable checks, and negotiating with OEO on matters pertaining to the CAA.

Significantly, the organizational chart shows the line of authority to flow from the Commissioners' Court to the Administering Board and then from the Administering Board to the Executive Director. Under the tab labeled "Administering Board" in the orientation manual (PX 5b) is a section detailing responsibilities of board members. Therein it is stated that the Administering Board is "the policy-making body of the CAA" and that "[a]ll major decisions regarding policy and major programs of the agency are determined by the Board." Further, the Board is described as the "permanent employer" of all CAA employees and staff members and is responsible for their work, "including that of the Executive Director". The same orientation manual contains a document labeled "Governing Regulations of the Administering Board of the Laredo-Webb County Community Action Agency." The regulations were approved October 18, 1976. Article VI, Section IV therein states that the Administering Board "shall be responsible for the planning, coordination, evaluation and administration of the community action program."

In June 1979, the Community Services Administration determined that the role of the Administering Board should be further strengthened. In October 1979, the Regional Director of CSA wrote Gonzalez advising him that, among other things, the local CAA had not yet revised its rules so as to provide that the Administering Board would participate jointly and concur formally in the selection of the Executive Director. (DX 2). Follow-up letters were sent, including one as late as May 29,

1980, threatening to deny future funding for non-compliance. (DX 3-5).

In sum, Gonzalez was the head of an agency created and heavily regulated by federal law. The Webb County Commissioners' Court had designated itself as the local CAA, but had delegated considerable powers to a separate Administering Board. This Board was clearly charged with the day-to-day supervision of Gonzalez and explicitly directed to evaluate his job performance. The federal authorities were urging that the Board be given even more power and threatening to cut off funds if this were not done. In this context, the mere statement by Gonzalez that he believed the Commissioners' Court was acting outside its authority *vis-a-vis* the Administering Board could hardly be said to have a substantial adverse impact upon his relationship with the Commisisoners' Court, much less hamper the Commissioners' Court in its overall responsibility for the program. It is simply not factually true that Gonzalez ever denied the authority of the Commissioners' Court to fire him. In proper context, it is even an overstatement to say that he disavowed their ultimate authority over him. The real issues were the authority of the Commissioners' Court to conduct a formal inquiry into Gonzalez' job performance when that duty was specifically delegated to the Administering Board and, less directly, Gonzalez' authority to discharge his deputy when that authority was seemingly clearly delegated to him.

Considering the clearly blurred lines of authority existing within this agency and the importance under the federal regulatory scheme of giving due deference to community representatives on the Administering Board, Gonzalez' statement that the Commissioners had exceeded

their authority in one area and should seek further clarification before taking hasty action did not have such an adverse impact upon his relationship with them to impair either his own effectiveness as Executive Director or to inhibit the Commissioners in the discharge of their duties to the public. It is true that, assuming the absence of any supervision, Gonzalez was probably in a position to thwart the goals of the agency and frustrate its objectives, but this is not what the subject dispute was all about. There is not the slightest suggestion that Gonzalez was frustrating the goals of the agency or that this intramural dispute hampered his effectiveness as Executive Director. On the contrary, it can be persuasively argued that Gonzalez had a duty to raise this issue of authority, especially in view of concerns earlier expressed by the CSA.

Nor can it be said that Gonzalez' statement impeded the Commissioners' power to implement policy for which they must answer to the voters. Although he questioned their authority to conduct an evaluation of his job performance, he offered to "cooperate and participate" in that undertaking and, in fact, the Commissioners conducted a lengthy investigation. Although he felt he had the authority to fire his deputy, he made no effort to thwart their reinstatement of the deputy. He disagreed, but was never disagreeable. He was not whimsically challenging his employer's authority. He was an employee operating under confusing and perhaps conflicting guidelines. There was keen public interest, bolstered by CSA officials, in monitoring the distribution of authority between local public officials and elected representatives of poverty neighborhoods and the public. His view that the Commissioners were overstepping their authority,

which could cause a loss of funding, was not unreasonable, arbitrary, or malicious. His suggestion that they seek clarification from CSA or change the written policies and procedures to remove the ambiguities (See PX 1, pp. 281, 283, 288), would, if anything, assist the Commissioners in properly discharging their duties to the public.

This Court has endeavored to faithfully perform the task assigned to it by the Fifth Circuit. So doing, it again concludes that the Plaintiff Gonzalez is entitled to prevail and a new judgment will be entered accordingly.

DONE at Laredo, Texas, this 10th day of July, 1984.

/s/ GEORGE P. KAZEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-80-46

EDGARDO A. GONZALEZ, JR.,
Plaintiff,

v.

C. Y. BENAVIDES, JR., ET AL.,
Defendants.

(Filed July 10, 1984)

FINAL JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law of August 27, 1981 and the Supplemental Findings of Fact and Conclusions of Law of even date herewith, it is ORDERED that the Plaintiff, Edgardo A. Gonzalez, Jr., do take nothing from the individual Defendants, namely C. Y. Benavides, Jr., Richard Morales, Jr., Homero Mata, L. H. Guerra and Arnulfo Santos. It is further ORDERED that Plaintiff shall recover from the same Defendants in their official capacities the sum of Forty Five Thousand Seven Hundred Twenty-Nine and 10/100 Dollars ($45,729.10), to be paid by the County of Webb, Texas. Said amount shall bear interest at the legal rate, 28 U.S.C. § 1961, from August 27, 1981 until paid.

Court costs are taxed to the Defendant County.

DONE at Laredo, Texas, this 10th day of July, 1984.

/s/ GEORGE P. KAZEN
United States District Judge

Supreme Court, U.S.
FILED
APR 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1234

In The

Supreme Court of the United States

October Term, 1985

C. Y. BENAVIDES, JR., WEBB COUNTY JUDGE, RICHARD MORALES, JR., COMMISSIONER, PRECINCT 3, WEBB COUNTY, HOMERO MATA, COMMISSIONER, PRECINCT 1, WEBB COUNTY, L. H. GUERRA, COMMISSIONER, PRECINCT 2, WEBB COUNTY, ARNULFO SANTOS, COMMISSIONER, PRECINCT 4, WEBB COUNTY, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE WEBB COUNTY COMMISSIONERS COURT; THE COMMISSIONERS COURT OF WEBB COUNTY, TEXAS, WEBB COUNTY, TEXAS,
Petitioners,

vs.

EDGARO A. GONZALEZ, JR.,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 85-1234

In The

Supreme Court of the United States

October Term, 1985

C. Y. Benavides, Jr., Webb County Judge, Richard Morales, Jr., Commissioner, Precinct 3, Webb County, Homero Mata, Commissioner, Precinct 1, Webb County, L. H. Guerra, Commissioner, Precinct 2, Webb County, Arnulfo Santos, Commissioner, Precinct 4, Webb County, in their Official Capacity as Members of The Webb County Commissioners Court; The Commissioners Court of Webb County, Texas, Webb County, Texas,

Petitioners,

vs.

Edgaro A. Gonzalez, Jr.,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Edgardo A. Gonzalez, Jr., respectfully requests that this Court deny the petition for writ of certio-

rari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 774 F.2d 1295 (5th Cir. 1985).

STATEMENT OF THE CASE

Petitioner's Statement of the Case is for the most part self-serving and omits facts material to the consideration of the Questions Presented in the petition. Respondent believes the Trial Court's Supplemental Findings of Fact and Conclusions of Law (Pet. 69a) and the Fifth Circuit's opinion in *Gonzalez II* (Pet. 18a) sufficiently and accurately detail the facts necessary for consideration of the Questions Presented. (*See* Pet. 20a-23a, 28a-29a, 32a-33a, 71a-81a.) The Petitioners do not dispute any of those fact findings.

Petitioners incorrectly state in the petition at page 5 Respondent requested that he be allowed to make a public statement at the *conclusion* of the investigation on June 23, 1980. The facts show Respondent asked to be placed on the agenda of the June 23rd meeting and made the statement at the beginning of the meeting. (Pet. 40a-41a.) That afternoon, after the Petitioners had interviewed a total of twenty-six witnesses, they invited Respondent into executive session to further discuss the matter. (Pet. 41a; *See* Pet. 22a.)

REASONS WHY THE WRIT SHOULD BE DENIED

The Court Below Fully Considered and Correctly Decided the Issues.

Petitioners contend the decision below is a departure from principles announced by this Court in *Connick v. Meyers*, 461 U.S. 138 (1983) However, if carefully read and reasonably interpreted, Petitioners' true argument is that the *holding* in *Connick* mandates a contrary result in this case. Their argument is foreclosed by the differences between this case and *Connick* in the character of the speech involved and the nature of the employment relationships. This case simply turns upon its own facts.

Respondent's speech concerned matters of substantial public concern. Petitioners make no suggestion to the contrary in their petition. By contrast, the speech in *Connick* touched upon matters of public concern in only a most limited sense prompting this Court to find that such a limited first amendment concern did not require the employer to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Petitioners' argument that similar recognition should have been given to their view of the impact of Respondent's speech is based on the premise that a close working relationship was essential to the fulfillment of their public responsibilities. (*See Connick*, supra at 152.) No such relationship was essential in this case and indeed did not exist. Moreover, as the courts below correctly found, Petitioners failed to offer evidence at the trial that Respondent's speech in any way affected, or was likely to affect, the efficient implementation of the goals and programs of the CAA. The facts of this case are

clearly not susceptible to the reasoning of the holding in *Connick* due to the disparate factual situations involved. Consequently, Petitioners now attempt in their petition to describe a purported "view" of the matter which they failed to articulate, much less prove, at the trial.

In view of the Petitioners' heavy reliance on language used by the Court below in *Gonzalez I* (Pet. 9, 13, 15, 20) to describe the types of relationships worthy of protection, it is important to note that Court was operating under two crucial errors in its perception of the facts. The Court mistakenly believed Respondent had denied the authority of Petitioners to fire him and that Respondent had refused to recognize the authority of the Petitioners over him. (*See* Pet. 71a, 79a.) The trial court found this was not the case (Pet. 71a, 79a) and the Court in *Gonzalez II* acknowledged the earlier mistake. (Pet. 22a, 32a.)

Petitioners argue the Courts below failed to give due weight to their governmental interest, as described in *Gonzalez I*, in maintaining a secure and confident relationship with Respondent as Executive Director of the CAA. Their argument suggests that efficiency of public service was promoted by discharging Respondent for his failure to blindly agree with them regarding their role as governmental sponsor of the CAA. The facts do not support their argument.

The primary responsibility for the efficient performance of the services provided by the CAA to the public was in the hands of the Administering Board and the Executive Director. (*See* Pet. 78a.) While the Commissioners Court was, by statute, the source of authority for the CAA, its

functions were mainly approval and ratification of the actions and policies of the Administering Board. The Administering Board was the immediate superior of Respondent and was responsible for supervising his work. (Pet. 78a). Thus, there was little connection, if any, between the relationship of Respondent and Petitioners and the government's interest as described in *Connick* of efficiently performing its services to the public. Rather, any disagreement as to program policies or activities which might have a bearing on efficiency would most likely occur between Respondent and the Administering Board, not Petitioners. As the trial court pointed out:

> "In this context, the mere statement by [Respondent] that he believed the Commissioners Court was acting outside its authority *vis-a-vis* the Administering Board could hardly be said to have a substantial adverse impact on his relationship with the Commissioners Court, much less hamper the Commissioners Court in its overall repsonsibility for the program."

(Pet. 79a).

Petitioners were not concerned with the fulfillment of their responsibilities to the public when they demanded Respondent retract his statements. Rather, they were selfishly preoccupied with their own power to the point of stating they would abandon the CAA if their own opinion about their function and authority was incorrect. (*See* Pet. 72a.) The "policy" Petitioners were truly concerned with was their opinion that they could do whatever they wanted regardless of federal guidelines and the views of the representatives of the public on the Administering Board. This position was drastically inconsistent with a true concern

for the public they were elected to serve and specifically those who directly benefitted from CAA programs. The CAA was created and heavily regulated by federal law and disregarding federal guidelines risked federal funding essential to the existence of the program. The question of the role of the Petitioners *vis-a-vis* the Administering Board should have been clarified through communication with CSA in view of the requirement that CAA policies and procedures comply with the CSA guidelines. Respondent suggested this course several times and demonstrated his loyalty by offering to help Petitioners change the policies to suit them. As the trial court noted, Respondent's suggestion that they seek clarification from CSA or change the written policies and procedures, would, if anything, assist Petitioners in properly discharging their duties to the public. (Pet. 81a.)

The Court below faithfully adhered to the *Pickering-Connick* requirement of giving full consideration to the government's interest in the effective and efficient fulfillment of its responsibilities to the public. The Petitioners' requirement that Respondent blindly agree with their interpretation of policies and procedures cannot be used to justify their retaliatory action against Respondent under the rubric of the Petitioners' interest in promoting the efficiency of public service. The evidence shows this was not their goal. Such a policy would impermissibly chill speech by public employees on matters of public concern, and as in this case, on matters of public concern peculiarly within the sphere of the responsibilities of his position.

For the foregoing reasons, as well as the reasons set

forth in the decisions below, the Fifth Circuit fully considered and correctly decided the issues.

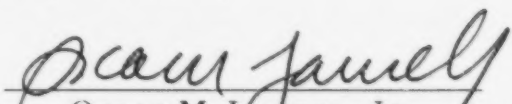
There is No Conflict Among the Courts that Warrants this Court's Intervention.

Petitioners acknowledge the record in this case is one of first impression. (Pet. 9.) Accordingly, they cite no conflict between the decision of the Court below and a decision of another court of appeals and none exists. There is likewise no conflict between the decision of the Court below and a decision of this Court. The very uniqueness of this case precludes review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

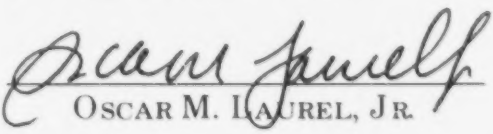
Respectfully submitted,



OSCAR M. LAUREL, JR.
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that three copies of Respondent's Brief in Opposition have this 4th day of April, 1986 been mailed to Mr. Lawrence A. Mann, 1016 Flores Ave., Ste. 2, Laredo, Texas 78042-0880, attorney for petitioners.



OSCAR M. LAUREL, JR.